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Labour
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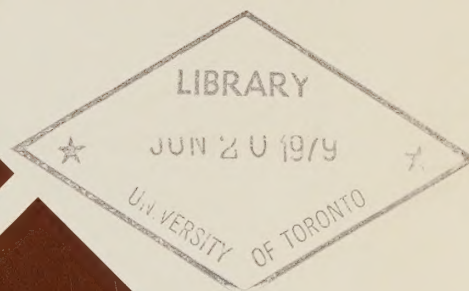
Decisions

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ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1979] OLRB REP.

Selected decisions of particular reference value are
also reported in *Canadian Labour Relations Boards
Reports*, Butterworth & Co., Toronto.



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S-79 – Duty of Fair Representation Union effecting written settlement of grievance – Language of written settlement imperfectly expressing union’s intention – Board refusing to reopen and arbitrate matter already settled – Union conduct indicating error in judgement only – Conduct not arbitrary discriminatory or in bad faith

BEFORE: E. Norris Davis, Vice-Chairman, and Board Members W. H. Wightman and O. Hodges.

APPEARANCES: *Lawrence C. Kozak for the applicant; W. R. Herridge and S. Cass for the respondent.*

DECISION OF E. NORRIS DAVIS, VICE-CHAIRMAN AND BOARD MEMBER O. HODGES; January 2, 1979.

1. This is an application under section 79 of The Labour Relations Act alleging a contravention of section 60.

2. The issue before us arises out of a grievance settlement negotiated with Crown Electric owned and operated by Crowle Electrical Ltd. by John Adema as a representative of the respondent union. The two complainants with others, were laid off by Crown Electric on December 23, 1977. A grievance was filed under a collective agreement effective from August 1, 1977 to April 30, 1979 which was denied by Crown Electric by letter of January 16, 1978 and on January 23, 1978 the respondent union filed an application referring the grievance to arbitration under section 112(a) of the Act. That matter, which was set down for hearing on February 6, 1978, was referred to a Labour Relations Officer on January 24, 1978. As a result of this referral a meeting was convened by the Officer on January 31st at which Adema represented the union and various representatives of the employer were present. The meeting resulted in a written document headed “Agreement of settlement of all matters in dispute” and signed by representatives of both parties. As part of that settlement the union sought leave of the Board to withdraw their application under section 112(a) and such leave was granted on February 1, 1978.

3. Subsequently the parties, Crown Electric and the respondent union, disagreed as to the interpretation of the written grievance settlement and on February 9, 1978, the respondent union filed a further application under section 112(a). A hearing was held On March 3, 1978. The Board upheld the employer’s preliminary objection that the grievance was not arbitrable by virtue of its prior settlement on January 31, 1978, and refused to admit extrinsic evidence to vary the settlement document on the grounds that there was no ambiguity in the words of that document and further that such evidence could not, in the circumstances, be admitted to establish either a unilateral or mutual mistake. See Board File No. 1711-77-M *Christian Labour Association of Canada and Crown Electric owned and operated by Crowle Electrical Ltd.* The Board, in that instance, found that the written grievance settlement of January 31, 1978 provided “for the payment of a total of \$2,376.42 as a *global sum* in satisfaction of the claim of all three grievors”. It had been the position of the union that the settlement they had intended would have provided an amount of \$2,376.42 to *each* of the three grievors.

4. The instant application alleges that the union in agreeing to this grievance settlement acted arbitrarily, contravening section 60 of the Act and seeks joint relief against both the union and its representative, John Adema for the difference between what the grievors received on a "global basis" and what they would have received on an "individual basis". Evidence was therefore heard by this panel of the Board in respect to the circumstances surrounding the grievance and its processing.

5. On December 22, 1977 Hukari, Parr, Proulx and some others (which latter are not here involved) were given notice by their employer that they would be laid off on December 23, 1978. Hukari phoned Adema (who is based in Toronto) on December 22nd, and advised him of the action and that they were being laid off out of seniority. Adema called the employer and arranged a meeting for December 28th and so advised Hukari on December 23rd.

6. The December 28th meeting was convened at 10:00 a.m. with Adema, Hukari, Proulx and Parr in attendance and with Jack Crowle, Barbara Crowle and Estella Peat representing Crown Electric. The union's position was that the lay off was in violation of the contract in that the company had failed to notify the union in advance and that the lay off was out of order of seniority. The union sought reinstatement and full compensation for the period of lay off. The company refused to accede to the union's position and after about 45 minutes the meeting broke up with the union requesting the company to put its reply in writing.

7. Subsequent to the meeting Adema informed the grievors he would file a "mass grievance" from Toronto, which he did by letter on December 30, 1977. By letter of January 16, 1978 the company denied the grievance and the union then proceeded to file the section 112(a) referral noted above.

8. A general employee meeting was held on January 24, 1978 at which Hukari was present, and amongst other things discussed was this pending grievance. The meeting was informed that the union might not be successful on the claim for reinstatement and might have to take a cash settlement. According to Adema, Hukari was in agreement with this position.

9. The next development was the meeting of January 31, 1978 called by the Labour Relations Officer at which several representatives of management were present together with Adema. Adema states that he had endeavored to have the grievors attend the meeting but it was the Labour Relations Officer's desire to have only Adema to represent the union. Prior to attending the meeting, Adema testified that he had made calculations involving the number of lost working days, vacation pay, insurance and travel allowances which were due and these amounted to approximately \$25.00 for each grievor. Adema's calculations differ from Hukari's in that Hukari includes claims for travel time which occurred at a prior time and which were never the subject of grievance and which, according to Adema were then stale dated; also Hukari's calculations would include one week's pay in lieu of notice which was included in the grievance claim but which Adema felt could not be contractually sustained.

10. The January 31st meeting lasted for one to one and one-half hours and ended in a written settlement, not prepared by Adema and presented to him by the Labour Relations

Officer. The settlement was signed by Adema on behalf of the union and by John Crowle on behalf of the employer.

11. Following the meeting Adema returned to his Toronto office and the following day, February 1, 1978, wrote individually to Hukari, Parr and Proulx advising each that they were entitled to \$2,376.46 conditional upon supplying to the employer a statement of no alternative employment during the period. Hukari testified that he and the other grievors while not completely in agreement with the settlement were nonetheless prepared to accept it.

12. Hukari testified that following receipt of this letter he attended at the Crown Electric offices and delivered the required statement of no alternative employment and was informed that the settlement money would be forwarded to Toronto which procedure he disagreed with. Hukari placed a call for Adema and left word for him to return the call which Adema did later that night. In the interim Hukari had been in touch with Proulx who informed him the company was taking the position that the sum of \$2,376.42 was to be divided amongst the three grievors. When Hukari talked to Adema he informed him of this. Adema reaffirmed that each grievor would individually receive \$2,376.42 and postulated that Hukari's difficulty with English had led to a misunderstanding. Adema then called Proulx and satisfied himself that the company's position as stated by Hukari was accurate: Adema informed Proulx that the company's position was not in accord with the understanding.

13. On the next working day, February 6, 1978, Adema called the company which confirmed their position as outlined by Proulx, and on February 9, 1978, Adema filed a new application under section 112(a) of the Act arising out of this application and the appointment of a Labour Relations Officer. A further meeting was held to come to a common understanding. This meeting was attended by Adema, Vanderclout (Executive Secretary of the union) and the union steward: the grievors accompanied these persons to the place of meeting and waited in another room while their representatives met for an hour with the Officer and company representatives.

14. Hukari testified that at this time he was asked by Vanderclout to settle for the \$800.00 and told them that if they did not agree to split the amount they might lose the whole thing. Hukari and the others stood firm for the \$2,300 settlement. Subsequent to the meeting in discussions with Vanderclout the grievors were told "we're going to try to do something with this one, to re-open the settlement and go to the Ontario Labour Relations Board".

15. Following the Board's decision of April 21, 1978, the grievors received individual cheques in the amount of \$813.07 directly from Crown Electric. The grievors then retained counsel in connection with these present proceedings.

16. The complainants make no allegation that Adema or the union acted in bad faith or discriminatorily. The complainants' position is that the union in executing the settlement of January 31, 1978 demonstrated such a lack of understanding of the import of the language being agreed to as to justify the conclusion that they did not address themselves at all to the issue and were acting arbitrarily.

17. The Board has no difficulty in accepting as fact that Adema prepared himself for the January 31st meeting with the objective of achieving a settlement of \$2,300 for each grievor. We have a similar lack of difficulty in accepting the fact that he was concerned after signing the January 31st document, that he had achieved his objective and so advised the grievors and also his superior, Vanderclout, and that it was only after the company took a different stance on settlement interpretation that the union began to entertain some doubts. As Vanderclout testified when he learned of the company's position on interpretation, he asked for the document and "when I read it I felt queasy and said it was difficult". Vanderclout at that time sought legal advice in respect to the matter.

18. At that point the union recognized that the language of the settlement document itself might not support their position but decided, with the concurrence of the grievors to endeavor to rectify the mistake through a further referral to arbitration at which they attempted unsuccessfully to introduce extrinsic evidence to vary the interpretation of the document.

19. The focus of the complaint is that the failure of Adema to recognize that the language of the written agreement he signed did not, in fact, effectuate the settlement he thought he had negotiated was an arbitrary action in contravention of section 60. Counsel for the complainant argues that Adema's failure to recognize the import of what he was signing goes beyond mere mistake or ordinary negligence and is to be characterized as "gross negligence" and, therefore, to be equated with "arbitrary conduct".

20. The case of *Walter Princesdoma v Canadian Union of Public Employees Local 100 – Ontario Hydro Employees Union* [1975] OLRB Rep. 444 contains a well researched review of the interpretative jurisprudence applicable in defining the word "arbitrary". It is clear from that decision, as well as others, that "it is necessary to distinguish arbitrariness (whatever it means) from mere errors in judgment, mistakes, negligence and unbecoming laxness" and we cite with approval the language of the Board in that case at paragraph 27, in which it is said:

"On the other hand we do not believe, at least at this time, that all mistakes and careless conduct by trade union officials fall outside the scope of section 60. It may be difficult to elaborate the precise meaning of arbitrary representation in advance but, as noted above, the very use of the word suggests that some regulation of the quality of decision-making was intended. Accordingly at least flagrant errors in processing grievances – errors consistent with a "not caring" attitude – must be inconsistent with a duty of fair representation. An approach to a grievance may be wrong or a provision inadvertently overlooked and section 60 has no application. The duty is not designed to remedy these kinds of errors. *But when the importance of the grievance is taken into account and the experience and identity of the decision maker ascertained the Board may decide that a course of conduct is so implausible, so summary or so reckless to be unworthy of protection. Such circumstances cannot and should not be distinguished from a blind refusal to consider the complaint.* However each case must be decided on its own peculiar facts and it is clear that the duty is not going to be a fertile field for the individual adversely affected by less flagrant conduct."

(emphasis added)

21. We do not, in the case before us, have a refusal by Adema to direct his mind to the grievor's complaint: all the evidence, up to the signing of the terms of settlement points to mature and deliberate consideration of the grievance including Adema's preparation of himself for the upcoming grievance negotiation of January 31st. The fault, if any, lies in his assessment of the import of the document he signed. The Board is satisfied that Adema sincerely believed at the time of signing that he had made the grievance settlement which he planned to make and that the document he signed was affirmatory of that. The question then narrows down to whether his misinterpretation of that document is so unsupportable, as to indicate a state of mind then existing, that it can only be characterized as resulting in a perfunctory consideration of the matter or a reckless disregard of it, or a "not caring attitude".

22. It is true that Adema has occupied his present position for some time and, on his own evidence, has been involved in many grievance settlements which were satisfactorily concluded. He cannot claim the protection of inexperience or unfamiliarity with the subject matter. Stated baldly, he made an error in judgment which detracted substantially from the grievance settlement quantum in favour of the grievors. Nonetheless, the Board must come to the conclusion that the unhappy result came about not because Adema refused or failed to direct his mind to the issue but rather, that he did direct his mind to the issue in a mistaken way.

23. The case of *Gina Ercegovic v United Glass and Ceramic Workers of North America – Local 260* [1975] OLRB Rep. 676 involved a situation where union representatives permitted a discharge grievance to become stale-dated and incapable of processing solely because of their lack of knowledge of the contractual terms relating to the matter. In that case the union representative had had no previous experience in handling a grievance of this nature and was admittedly unfamiliar with the required procedures. The Board there found that while, in that Board's language, "that the grievor's complaint was so mishandled by the respondent's representatives that it borders on a disgrace," nonetheless, having regard to the level of expertise of the persons involved and the subsequent efforts to repair the damage, the conduct was not in breach of section 60. We think that the respondent's position in the instant case is of a higher order than in that case inasmuch as in the earlier case there was a total failure by that respondent to address itself to the relevant terms of the collective agreement. We are not prepared in this case, with the benefit of hindsight, to conclude that the respondent's misinterpretation of the document was so perverse as to justify a conclusion that it was the equivalent of refusing to address the issue at all.

24. The relevant part of the settlement terms signed by Adema reads,

"The respondent agrees to a cash settlement of \$2,376.42 to cover all compensation to the three grievors: Albert Proulx, Raymond Parr and Olavi Hukari conditional upon them proving that they have not had earnings from any other source since date of lay off."

This Board, in its April 21st decision, held that the language was clear on its face that a "global" and not an "individual" settlement had been agreed to and with that interpretation there can be no quarrel. It seems to us, however, that, putting ourselves in Adema's position

at the time of his accepting that document, and considering the surrounding circumstances we are not prepared to conclude that a person of Adema's experience and background could only have misinterpreted the document through a reckless or wilful disregard of the meaning of language. There is the fact that the document was the consummation of a settlement negotiated by the Labour Relations Officer in which the parties sat separately and not together, and the fact that Adema clearly believed that the settlement he sought had been achieved, and the fact that the document was not drawn by Adema which all must be taken into account. The reference in the document to the words "... Albert Proulx, Raymond Parr, and Olavi Hukari conditional upon them proving that they have not had earnings from any other source since date of lay off", which refer to actions to be taken by the individual grievors, could well have weighed more heavily in Adema's assessment at that time of the total meaning of the document than the words in the first sentence thereof. That this was a mistaken assessment is unfortunate but the sheer fact that it was an assessment precludes the action from falling within the meaning of being "arbitrary".

25. The complaint is therefore dismissed.

DECISION OF BOARD MEMBER W. H. WIGHTMAN:

1. While joining my colleagues in the decision to dismiss this application I also feel obliged to comment on paragraph 24 of the decision. I would not have interpreted the portion of the settlement terms, as recited in paragraph 24, to mean that if any *one* of the grievors "had earnings from any other source since the date of layoff" all *three* would have lost their entitlement to cash. Such an interpretation would make no sense.

2. Nor, would I have thought it reasonable to believe the parties intended to establish a form of "tontine" wherein if one grievor had earnings he would be disqualified and the remaining two would divide the spoils.

3. I would thus be driven to the only remaining possibility being that the provision concerning earnings was intended to reflect an agreement that each of the three was to receive a cash settlement in the amount of \$2,376.42.

4. Not being trained in the law I recognize that the courts or an arbitrator might find me wrong but, if so, and if indeed the employer originally agreed to a cash settlement of \$2,376.42 each and is now hiding behind a technicality, I can only conclude with the observation that this seems to me a short-sighted approach to labour-management relations.

5. Experience suggests that when unions and employers arrive at an agreement it is in the best interest of both parties to live up to the spirit of the agreement, however, the agreement may have been expressed in written terms. Recognition of this precept builds mutual confidence and respect, whereas disregard for it can only lead to longer term labour-management problems the negative aspects of which are likely to be more costly than any short term gain.

1648-78-U Ralph Malcolm Derry, Complainant, v. **Booth Avenue Hospital Laundry Inc.** and The Textile Rental Institute of Ontario, Respondent, v. Laundry, Dry Cleaning & Dye Workers International Union, Local 351, Intervener.

Arbitration – S-79 Board deferring to arbitration where alternative remedy available

BEFORE: P. C. Picher, Vice-Chairman and Board Members D. B. Archer and F. W. Murray.

APPEARANCES: *Ralph Malcolm Derry for the complainant; S. C. Bernardo and N. Pavlovich for Booth Avenue Hospital Laundry Inc.; S. C. Bernardo for The Textile Rental Institute of Ontario and Keith Coutlee and Charles Judge for the intervener.*

DECISION OF THE BOARD; January 31, 1979

1. The Textile Rental Institute of Ontario was removed as a party respondent in this matter as no breach of the Labour Relations Act was alleged in relation thereto.

2. Mr. Ralph Malcolm Derry filed a complaint under section 79 of the Act alleging that he was dealt with by the respondent company, Booth Avenue Hospital Laundry Inc., contrary to the provisions of sections 58 and 61 of the Labour Relations Act. Mr. Derry complained that he was dismissed by the respondent in the guise of being laid off for the purpose of inhibiting his legitimate union activities and intimidating other members.

3. Counsel for the respondent asked the Board to follow its normal practice in a matter of this nature and defer to the grievance and arbitration procedure established by the collective agreement in effect between the parties. Counsel pointed out that under article 3.02 of the collective agreement the employer is prohibited from discriminating against an employee by reason of his union activity.

Article 3.02 reads as follows:

3.02 – The Employer agrees that no employee shall in any manner be discriminated against or coerced, restrained or influenced on account of membership or nonmembership in any labour organization or by reason of any activity or lack of activity in any labour organization, subject to the provisions of this agreement.

Having regard to the employer's duty under article 3.02 counsel argued that full redress for Mr. Derry's complaint would be available through the arbitration procedure. Counsel further gave an undertaking to the Board confirming that if the matter went through the grievance and arbitration procedure the employer would raise no technical objections to its being heard on its merits.

4. In the *Corporation of the County of Middlesex*, [1976] OLRB Rep. Aug. 427 the Board summarized its practice in deferring to arbitration. At page 427 the Board stated,

Where an alleged unfair labour practice also constitutes at the same

time an alleged breach of a collective agreement, the Board has generally chosen to exercise its discretion under section 79 of the Act and defer the matter to grievance arbitration. (See *Collingwood Shipyards* [1967] OLRB Rep. July 376; *Sunnybrook Food Market (Keele) Ltd.* [1972] OLRB Rep. March 210.) However, in exceptional circumstances where the arbitration process is "clearly unavailable or unsuitable to resolving the issue", the Board will depart from its general practice and will itself hear the matter.

Section 37 of the Act dictates that issues concerning the interpretation, administration or alleged violation of a collective agreement must be determined by a Board of Arbitration. If the Board were to regularly entertain complaints which might otherwise be arbitrated it would undermine its Act and cripple the very process the Act imposes on the parties. (See *Imperial Tobacco Products (Ontario) Limited*, [1974] OLRB Rep. July 418; *Sunnybrook Food Market (Keele) Ltd.*, [1972] OLRB Rep. March 210; *Collingwood Shipyards Ltd.*, [1967] OLRB Rep. July 376; *National Showcase Co. Ltd.*, 61 CLLC Para 16,185).

5. Having regard to the nature of the complaint raised by Mr. Derry, the terms of the collective agreement in effect between the parties as well as the employer's undertaking that it will raise no technical objections to the matter being heard on its merits, the Board is satisfied that this case does not present any exceptional circumstances to cause it to depart from its well established practice of deferring to arbitration in those circumstances where the alleged unfair labour practice also constitutes an alleged breach of a collective agreement.

6. The complaint is therefore dismissed.

1323-78-R Adrienne Ponsen, (Applicant), v. United Steelworkers of America, Locals 3129 and 7921, (Respondent), v. **Canadian Appliance Manufacturing Company Limited**, (Intervener).

Termination – Substantial accretion to bargaining unit resulting from merger of several companies – New collective agreement signed covering expanded bargaining unit – New agreement not a voluntary recognition agreement

BEFORE: M. G. Picher, Vice-Chairman, and Board Members D. B. Archer and W. H. Wightman.

APPEARANCES: Hart M. Rossman and Adrienne Ponsen for the applicant; Paul Cavalluzzo, John Fitzpatrick and Laura Alper for the respondent; John P. Sanderson for the intervener.

DECISION OF THE BOARD; January 5, 1979

1. This is an application under section 52 of The Labour Relations Act for a declaration that the respondent no longer represents certain employees of the Canadian Appli-

ance Manufacturing Company Limited employed in its plant at 6 Monogram Place, Weston. The applicant is a member of a bargaining unit of office and clerical employees at that location, and while the application is not specific in this regard, the Board treats it as applying only to the bargaining unit of which the applicant is a member.

2. The principle facts giving rise to this application were considered in an earlier decision of this Board, *Canadian General Electric Company Limited* [1978] OLRB Rep. June 501. In that case the intervener in these proceedings applied to the Board under section 55 of The Labour Relations Act for clarification of the scope of the bargaining rights held by the United Steelworkers of America, on behalf of two of its locals at several plants, including the plant that is the subject of this application. In its decision in that case the Board related the facts as follows:

“4. The applicant company came into existence in January, 1977 as the result of a merger of GSW Appliances Ltd. and the Appliance Division of Canadian General Electric Ltd. A further merger occurred in July, 1977, when the applicant purchased the Appliance Division of Canadian Westinghouse Ltd.

5. When the first stage of the merger took place in January, GSW Appliances Ltd. (G.S.W.) was a party to collective agreements with each of the two Steelworker locals. The agreement with Local 3129 contained a clause recognizing that Local as ‘the sole collective bargaining agency for all of the employees in Metropolitan Toronto, save and except guards, office and clerical workers, foremen and those above the rank of foreman’. This bargaining unit, which will be described as ‘the plant and maintenance unit’, included employees at G.S.W.’s two Toronto locations – Gibson and Wright Avenues and 35 Suntract Road. The agreement with Office Local 7921 contained a clause recognizing that Local as ‘the sole collective bargaining agency for all office, clerical, and technical employees in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisors and salesmen [and certain other named positions]’. This bargaining unit, which will be described as ‘the office and clerical unit’, also covered employees at both of G.S.W.’s Toronto locations.

6. Another local of the Steelworkers, Local 5264, at the same time held bargaining rights at Canadian General Electric’s Consumer Products Service facility, located at 2 Monogram Place, Weston, for consumer products service technicians assigned to work in and out of Metropolitan Toronto. This bargaining unit did not include either the warehouse employees or the office and clerical employees, who were unorganized at that location. The applicant company has since signed a collective agreement recognizing that the Steelworkers, Local 5264, holds bargaining rights for this bargaining unit. At the time of the hearing, however, there were approximately 20 warehouse employees and 30 office and clerical employees not included in this bargaining unit.

7. The second stage of the merger, occurring in July 1977, resulted in

the acquisition of the two Toronto facilities of the Appliance Division of Canadian Westinghouse Ltd. – one at 110 Norfinch Drive, Downsview and the other at 840 York Mills Road, Don Mills. The respondent, United Electrical, Radio and Machine Workers of America (UE) and its Local 154, held certain bargaining rights at both locations. These bargaining rights were recognized by the applicant in two agreements that it signed with the UE on July 27, 1977. One agreement identified as the company 'Canadian Appliance Manufacturing Company Limited located at 110 Norfinch Drive, Downsview, Ontario' and contained a clause recognizing 'the Union as the sole and exclusive bargaining agent for all employees of the Company, save and except assistant foremen, persons above the rank of assistant foreman, supervisor of building maintenance, counter sales clerks, salesmen, office staff, and persons engaged on a formalized training programme, with respect to rates of pay, hours of work, and other conditions of work.' Approximately 25 employees were included in this bargaining unit and less than 10 persons were excluded from the unit as office and clerical employees. The other agreement identified as the company 'Canadian Appliance Manufacturing Company Limited located at 840 York Mills Road, Don Mills, Ontario' and contained a clause recognizing 'the Union as the sole and exclusive collective bargaining agent for all employees of the Company, save and except assistant foremen, persons above the rank of assistant foremen, supervisor of building maintenance, counter sales clerks, salesmen, office staff, and persons engaged on a formalized training programme, with respect to rates of pay, hours of work, and other conditions of work.' Approximately 26 employees were included in this bargaining unit, and less than 10 persons were excluded from this unit as office and clerical employees.

8. In January of 1978 discussions took place between the officials of the applicant and representatives of Steelworkers concerning the removal of certain work to 2 Monogram Place. In a letter dated January 24, 1978, the applicant indicated to the Steelworkers that, in its opinion, the move did not constitute a breach of the collective agreement.

9. On February 16, 1978, the applicant signed two collective agreements – one with Local 3129 of the Steelworkers and the other with Office Local 7921 of the Steelworkers. Both collective agreements were for a term running from June 24, 1977 to June 23, 1978 and both identified the applicant company as the Canadian Appliance Manufacturing Co. Ltd., Weston, Ontario. The recognition clauses in these two collective agreements were the same as those in the agreements between these two Locals and G.S.W.

10. Following the signing of the collective agreements, the union indicated to the applicant that it was claiming bargaining rights in respect of employees at all of the applicant's locations in Metropolitan Toronto. On February 24, 1978, two grievances were filed, one by Local 3129 and the other by Office Local 7921, contending that the applicant was

in breach of the collective agreement by failing to deduct union dues for certain employees at Monogram Place, York Mills Road, and Norfinch Avenue. The Steelworkers later clarified this position, informing the applicant that no claim was being made in respect of employees covered by the collective agreements with the UE.”

3. In that case the Board determined that section 55 of The Labour Relations Act had no application to the dispute between the parties. The conflict between them did not arise out of the sale or transfer of a business but, rather, was a disagreement as to the scope of the recognition clause in a collective agreement entered into between the company and the union subsequent to the transfer of the business. The Board therefore concluded that the issue was one to be resolved at arbitration.

4. Clarification of the scope of the bargaining rights was subsequently pursued through arbitration. In an award dated October 5, 1978, Mr. O. B. Shime, Q.C., acting as sole arbitrator, determined that the acquisition by merger of the C.G.E. plant operated as an accretion to the existing bargaining units. The arbitrator therefore concluded that the employees in question were included in the bargaining units represented by the Steelworkers locals.

5. Section 52(1) of the Act provides as follows:

52.-(1) Where an employer and a trade union that has not been certified as the bargaining agent for a bargaining unit of employees of the employer enter into a collective agreement, or a recognition agreement as provided for in subsection 3 of section 15, the Board may, upon the application of any employee in the bargaining unit or of a trade union representing any employee in the bargaining unit, during the first year of the period of time that the first collective agreement between them is in operation or, if no collective agreement has been entered into within one year from the signing of such recognition agreement, declare that the trade union was not, at the time the agreement was entered into, entitled to represent the employees in the bargaining unit.

6. That section of the Act is designed to protect employees whenever their employer and a trade union that has not been certified as their bargaining agent enter into a recognition agreement or a collective agreement which would amount to a voluntary recognition of the union as the employees' bargaining agent. The section is intended to give employees a means of defeating the “sweetheart agreement” in which their interests are not protected through the kind of arms-length relationship between employer and union that is contemplated by The Labour Relations Act.

7. In this case the applicant submits that the arbitrator's award had the effect of giving the respondent locals voluntary recognition as bargaining agents of the employees. In our view that is an incorrect characterization of the facts. It is evident from the decision of the Board in the section 55 application and the decision of the arbitrator that the company resisted recognition of the bargaining rights of the union at every turn. The company and the union were sharply divided as to the scope of the recognition clause in their agreement and that matter was decided in a final and binding manner by the award of the arbitrator.

Bargaining rights the scope of which was clarified by the finding of an accretion by an arbitrator can scarcely be described as bargaining rights arrived at by voluntary recognition.

8. That being the case, the Board finds that section 52 of The Labour Relations Act has no application in these circumstances. The application is, therefore, dismissed.

1099-76-R International Federation of Professional and Technical Engineers, A.F. of L., C.I.O., C.L.C., Applicant, v. **Canadian General Electric Company Limited**, Respondent, v. International Union of Electrical Workers, and its Local 599, Intervener.

Certification – Employee – Effect of 25 year old finding that subject persons are managerial – Whether evidence confined to changes in duties and responsibilities – Whether facts demonstrate managerial status

BEFORE: Pamela C. Picher, Vice-Chairman and Board Members J. D. Bell and O. Hodges.

DECISION OF VICE-CHAIRMAN, PAMELA C. PICHER AND BOARD MEMBER O. HODGES:

1. The International Federation of Professional and Technical Engineers has applied to be certified as the exclusive bargaining agent for all cost estimators (Classes I and II) and cost analysts at the respondent's plant in Peterborough.

2. By a decision dated August 15th, 1978 (File No. 0676-78-R) the Board found that the applicant was a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.

3. By way of objection to this application the respondent raised the plea of *res judicata*. In 1954 the Board found that senior cost clerks were not employees for the purposes of the Act and that they therefore could not engage in collective bargaining. The respondent argues that through the doctrine of *res judicata* the Board is bound by the 1954 decision and thus precluded from certifying the applicant on behalf of the cost estimators and cost analysts. The parties agree that the 1954 category of senior cost clerks relates to the same category of persons covered by this application.

4. The applicant and intervener contend that for any one of the following reasons the plea should not preclude this Board from evaluating anew the employment status of the cost estimators and cost analysts: firstly, because the respondent could not establish the necessary prerequisites to the plea; secondly, because even if it could, the plea is displaced by a sufficient change in either the relevant law or the duties and responsibilities of the persons in question; or thirdly, because in all the circumstances of this case the Board should exercise its discretion to decline to apply the plea.

5. By an interim decision in this matter dated April 6th, 1978, the Board found that the respondent had established the prerequisites to the plea of *res judicata*. With respect to a major item in dispute between the parties in this regard, the Board found that, notwithstanding its powers of reconsideration under section 95(1) of the Act, its decisions are sufficiently final for a doctrine analogous to *res judicata* to be properly applicable to them.

6. Using the directions in the interim decision as a base, the Board held a hearing to determine the following issues: whether there has been a sufficient change in either the law or the facts since the 1954 decision to negate the applicability of the doctrine analogous to *res judicata*; if not, whether the Board in the circumstances of this case should exercise its discretion to decline to apply the plea; and if the Board declines to apply the plea for any one of the above reasons, whether the cost estimators and cost analysts are excluded from collective bargaining by virtue of section 1(3)(b) of the Act.

7. On October 2, 1978, the Board issued the following award:

For reasons to follow in writing the Board is satisfied firstly, that notwithstanding the plea of *res judicata* the Board should inquire into the present duties and responsibilities of the cost estimators and cost analysts and secondly, having done so, that the cost estimators and cost analysts are employees within the meaning of the Act and are not excluded under the provisions of section 1(3)(b) of the Act.

2. The parties should notify the Board with respect to any representations they may wish to make concerning the bargaining unit and any other outstanding issues.

8. The reasons for the Board's conclusion are set out below and begin with a consideration of whether or not there has been a sufficient change in the law to cause the Board to consider from a present day perspective the employment status of the cost estimators and cost analysts.

9. At the time of the 1954 decision section 1(3)(b) of the Act excluded from the definition of "employee" managers, superintendents, persons exercising managerial functions or persons employed in a confidential capacity in matters relating to labour relations. Today the Act excludes any person who "in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations". Since the Board's 1954 decision, therefore, the Act has been modified to exclude two categories of individuals rather than four.

10. The Board's endorsement of the record in 1954 determining that senior cost clerks were not employees for the purposes of the Act did not indicate within which of the section 1(3)(b) categories they fell, i.e., whether they were managers, superintendents, persons exercising managerial functions or persons employed in a confidential capacity in matters relating to labour relations. Additionally, the Board did not provide reasons for either the majority or dissenting decisions.

11. Counsel for the applicant and intervener argue that the Board must re-examine the matter within the present statutory framework because the changes in the statute, cou-

pled with the absence of reasons for the Board's 1954 decision, raise the possibility that the persons in question were excluded under one of the two categories that no longer exists, i.e., because they were managers or superintendents. This possibility, they argue, leads to the critical point that under today's statute they might not be excluded from collective bargaining.

12. Counsel for the respondent, on the other hand, contends that the statutory changes are not relevant in this case either because, having regard to the facts, the 1954 Board could only have decided the matter on the basis of whether or not the senior cost clerks exercised managerial functions or were employed in a confidential capacity or because the statutory changes were merely changes of form since in his view "manager" and "superintendent" were fully subsumed by the phrase, "exercise managerial functions".

13. Mr. Bruce H. Martin, presently the manager for Employee and Community Relations for the Peterborough operation, testified in the instant hearing as to his duties and responsibilities when he was employed as a senior cost clerk in 1954. Counsel for the respondent asked the Board to agree that it was evident from Mr. Martin's testimony, as well as his memory of how the parties framed the issues for the 1954 Board, that the 1954 Board could not have found that the senior cost clerks were either managers or superintendents and therefore must have excluded them on the same statutory language that exists today. In support of its argument counsel pointed to the Court of Appeal's decision, *Bradley et al v. Canadian General Electric Company Limited and Ontario Labour Relations Board* (1954), 8 D.L.R. (2d) 65, 57 CLLC ¶15,318, relating to the review of the four categories of employees who had not been excluded by the 1954 Board. It appears from the record that for the purposes of the four categories under review, the court assumed that they had been excluded either because they exercised managerial functions or because they were engaged in a confidential capacity. We note in this regard that the company's reply to the original application simply alleges that all categories of employees should be excluded under section 1(3)(b) of the Act.

14. Despite Mr. Martin's testimony of either his duties and responsibilities as a senior cost clerk in 1954 or his understanding of the company's argument before the Board based on his presence at some but not all of the hearings, we can be sure of no more than that the Board placed the senior cost clerks in at least one of the four possible categories of exclusion. Furthermore, the Board is not sufficiently assured by the Court of Appeal's brief reference to the company's position when the status of the senior cost clerks was not in issue before it. While indicators might suggest that the Board excluded the senior cost clerks under one or both of the classifications remaining in the statute today, the Board declines to draw such a conclusion when the effect of it could be to deny persons access to collective bargaining on the basis of a principle analogous to *res judicata*. The purpose of the Act is to promote collective bargaining. To refuse to even hear a present day application after 24 years because there has been no change in the law when the relevant section of the statute has in fact been revised would require a more conclusive indication that the change would not have affected the previous decision.

15. With respect to counsel's argument that the statutory changes are merely changes of form, the Board is not prepared to accept that the Legislature intended to promulgate empty phrases by including "manager" and "superintendent" in the list of exclusions. This is especially true when "manager" or "superintendent" may reasonably encompass persons bearing those titles without reference to their duties. The brevity of the Board's early deci-

sions makes it difficult to determine to what extent the Board at that time drew a distinction between the phrases.

16. The statutory changes to section 1(3)(b) dictate that the Board not be inextricably bound by the decisions made 24 years ago and that it look anew at the duties and responsibilities of the cost estimators and cost analysts. As an administrative tribunal, the Labour Relations Board was established to respond efficiently and with expertise to ever-changing labour-management problems. To insist on the finality of a Board decision in the face of the statutory changes would be to elevate the reliance interest of the employer beyond both proper and necessary proportions and risk sacrificing equitable treatment for this applicant and the persons it seeks to represent.

17. In view of the Board's decision on the law as applied to section 1(3)(b) of the Act, it is unnecessary for the purpose of the plea of *res judicata* to inquire into whether or not there has been a change in the duties and responsibilities of the cost estimators over the last 24 years. We turn, therefore, to consider whether the cost estimators and cost analysts exercise managerial functions within the meaning of section 1(3)(b) of the Act.

18. In making determinations under section 1(3)(b) of the Act, the Board has continually recognized that effective collective bargaining necessitates an arms length relationship between employees on the one hand and management on the other. The managerial exclusion in section 1(3)(b) is designed to exclude from the definition of "employee" those persons who, because of the exercise of managerial functions, would be placed in a conflict of interest position if allowed to engage in collective bargaining. The term "managerial functions" is not defined by the Act. The Board therefore must assess the facts of each case to determine whether the duties and responsibilities in question have true managerial significance. Over the years the Board has pointed to various categories of individuals as benchmarks and developed guidelines to assist in its evaluation. (See *Inglis Limited* [1976] OLRB Rep. June 270; *Chrysler Canada Limited* [1976] OLRB Rep. Aug. 396; *McIntyre Porcupine Mines Limited*, [1975] OLRB Rep. April 261). For those persons whose work has little or no impact on the employment relationship such as the cost estimators and cost analysts in this case, the Board looks to whether or not they exercise independent decision-making responsibility in matters of policy or the running of the organization. The Act does not operate to exclude those who only make effective recommendations in this regard or whose independent decisions are circumscribed within predetermined limits set by others or who are limited to technical and procedural decisions flowing from their expertise in a limited field. (See *Libby McNeill & Libby of Canada*, [1967] OLRB Rep. May 193; *Inglis* (1975), *supra*; and *Dominion Stores Limited* [1976] OLRB Rep. Aug. 444.)

19. At the outset of the Examiner's hearings the parties agreed that the evidence of Messrs. Roger Smith, Larry Longo, Wallace Smith and Andrew Goldie would be representative of all cost estimators and cost analysts covered by the application.

20. Counsel for the respondent contends that the duties and responsibilities of the persons examined possess true managerial significance because they relate to something which, as he describes it, goes to the "guts" of the respondent's operation – costs. He argues that the cost estimate is the single most important cost decision because it forms the basis of mark-ups and profits. Counsel argued that the cost estimators and analysts decide everything with respect to the cost estimate and that in reaching their estimate they are required

to exercise independent discretion of a managerial nature. Counsel for the applicant and intervener, on the other hand, characterized the cost estimators and cost analysts as collators who in reaching their cost determination bring together various pieces of cost information which are largely supplied or predetermined by others.

21. The basic job of the cost estimator and cost analyst is to set out what the cost to the company will be for a particular machine, part, small motor, nuclear motor or fuel handling system. The estimate is derived from an evaluation of the labour, material and overhead costs. The request for an estimate normally comes from the marketing or engineering division of the respondent and is accompanied either by specific information concerning relevant details of the product or by a reference to a similar product produced in the past. The cost details for a reference would be historical data, that is, the cost information recorded as the actual machine was being produced. If the information provided is insufficient, the cost estimator will normally go back to marketing or engineering personnel for further details. He may, for example, need more information concerning the place and manner of production or assistance from methods people concerning the times involved in various steps of production.

22. Labour costs are basically derived from labour hours multiplied by labour rates. The labour hours are normally obtained either from historical data or, if it's a new type of product, through consultation with time study people. Mr. Longo testified that with piece-work he uses the incentive time put on the ticket by someone else. Mr. W. Smith testified that he applies a "buggery factor" which is the extra time his experience tells him something may take to be produced no matter what the planner says. He indicated that he has been criticized for his "buggery factor" and won't use it on a detailed estimate.

23. With respect to the labour rate the testimony indicates that reference is normally made either to historical data which might have to be updated or to a published table of rates covering all the relevant groups of employees. Sometimes an average rate is used where production involves work from several different classifications. Projected labour increases must be accounted for where the production of the machine/motor/system will take place over an extended period of time. These are either calculated by the supervisor as in the case of Mr. Longo or based on information supplied by management or financial operations.

24. Some additional factors are included in the labour costs. Mr. Goldie and Mr. R. Smith testified that they include an adder reflecting store-wide operations broken down by product. Mr. Goldie stated that this figure is a predetermined percentage related to different product lines and that he has no part in its determination. Mr. R. Smith testified that he obtains the figure from his supervisor. To determine the labour costs Mr. Goldie also applies a quality assurance factor, the compilation of which involves no independent decision on his part as the information is supplied by others. Mr. W. Smith applies a multiplier to account for the setup costs. Although he has some input into the formulation of the figure, he testified that the final decision concerning the percentages is made by others. Mr. Goldie testified that his setup factor comes from historical data. Overhead is calculated as a percentage of the labour rate. The evidence indicates that the percentage is determined by financial operations and that the cost estimators have no role in its formulation.

25. The material cost is composed of the amount of material multiplied by the cost.

Where the product is similar to one produced in the past, the cost estimator normally uses historical data to ascertain the specific nature and amount of material involved. Where significant differences exist the estimator may obtain such information from the marketing or engineering divisions. Mr. W. Smith testified that a material loss factor from cutting is applied and is contained in an operational and policy guide put out by central finance. He testified that for new items he helps determine the loss figure along with the foreman and methods men.

26. For the cost of the material the testimony indicates that where the product is of sufficient similarity to one previously produced, reference is generally made to historical data escalated to present day levels through reference to statistics published by financial operations. The estimators take no part in the formulation of this information. Some material is standard-costed for the year and the amounts are published. Though the estimators generally play no part in establishing the standard prices, Mr. W. Smith testified that he might set a standard cost for items related solely to his area of small motors.

27. Mr. Goldie testified that he applies a contingency factor to his estimate if at the time of his quotation some of the information on the job is not yet available, for example, if the final design is not ready. The contingency factor reflects a margin of uncertainty in the estimate and may run as high as 15 per cent.

28. Mr. Goldie, unlike any of the other witnesses, is involved in estimating fuel handling systems. These estimates are different in that they tend to involve a new piece of equipment every time which might take up to six years to produce. The quote itself may take six months. Historical data is of little use and the estimate is made up through input from a group of representative specialists figuring out the most appropriate design and method of manufacture. Mr. Goldie makes his cost calculation based on the information supplied by the specialists. The labour hours, rates, overhead, quality assurance figure, material types, amounts and costs are supplied to him. He does have some input into the contingency figure but does not make the decision as to what it will be.

29. Once the quotes are determined the estimators normally send them to the marketing division. All four witnesses testified that quotes are occasionally sent back for reworking either because marketing questions the accuracy of the quote or because they want a comparison quote using different material or methods.

30. Each of the witnesses testified that in addition to his estimating responsibilities, he monitors the product as it is being produced. Monitoring serves to ensure that actual costs are in line with the estimate and that the costs charged to a particular item are legitimate as well as to build up historical data or reference material for future estimates. Where the actual costs are out of line with the estimate, the estimators may question others involved in production for the reasons why.

31. Some costs in the actual production are deemed to be excessive and must be written off, that is, not charged to the particular product but spread over the product line. Mr. Longo and Mr. W. Smith testified that they do not have authority to decide which costs should be written off. Mr. R. Smith may decide what should be written off but has fairly comprehensive guidelines to follow and would talk to his supervisor if the matter wasn't covered by the guidelines. Mr. Goldie testified that he has full authority to write off. There is a policy guide available to him but he has never read it.

32. Each witness is on a cost improvement team to devise suggestions for more efficient means of production. The cost estimator is responsible for auditing the cost of a suggestion but plays no part in determining whether the suggestion is accepted. As a final duty the estimators are responsible for taking inventory once a year.

33. Having regard to the evidence, the Board is fully satisfied that the cost estimators and analysts do not exercise managerial functions within the meaning of section 1(3)(b) of the Act. As indicated above in paragraph 18, the Board, in determining whether persons such as the cost estimators and analysts whose duties have little or no impact on the employment relationship exercise managerial functions, looks to whether they exercise independent decision-making responsibility in matters of policy or the running of the organization. The evidence clearly supports the conclusion that they make no such decisions.

34. The cost estimators and cost analysts gather information together from a variety of sources to determine a cost estimate. While they may exercise limited independent discretion, most of the information they need either is supplied to them by others, e.g., methods-men or persons in manufacturing, engineering, purchasing or financial services, or is available through historical data, the compilation of which involves no independent decision-making responsibility as it is derived from a straightforward recording of the actual amounts of materials, times and costs involved in the actual production of an item. The estimator is given the labour rates through schedules and at most has to figure out an average. He is given the percentage escalation figures, the overhead percentage, the quality assurance factor and adders. Most do not have authority to write off but apply the decisions of supervisors. Those who do have the authority to write off have policy guidelines available to them. Material amounts are obtained either through the engineering division or historical data. Most material costs are supplied through schedules or historical data. In general, to reach an estimate an estimator takes numerous pieces of gathered information and makes the necessary calculations. In this regard, he closely resembles a collator of information.

35. Whatever limited independent discretion the estimators may exercise in their work, it is not related to policy or the running of the organization but is limited instead to the technical process of analyzing the cost and emanates from their expertise in that limited area. The estimators and analysts play no part in deciding what the company should do with an estimate. They are not involved in make vs. buy decisions beyond the recommendations stage. They do not help decide whether the respondent will actually produce what has been estimated. If something is produced and sold, they have no role in deciding what the markup should be. As well, they play no part in setting the budget or establishing projected costs escalations. While we may agree with counsel for the respondent that the cost estimate is a vital function going to the "guts" of the operation, we cannot agree that the cost estimators or cost analysts decide everything that goes into the cost estimate. The evidence indicates that they decide almost nothing and operate within very narrow, predetermined limits.

36. Having regard to all of the evidence, therefore, the Board is satisfied that the cost estimators (Classes I and II) and cost analysts do not exercise managerial functions within the meaning of section 1(3)(b) of the Act and are therefore employees for the purposes of the Act.

DECISION OF BOARD MEMBER J. D. BELL:

1. On October 2nd, 1978, the majority of the Board issued an award in which I dissented.

2. I would first like to comment on the majority's reason for rejecting the plea of *res judicata*: which appears to be based on the fact that the words – *managers, superintendents* – were deleted from section 1(3)(b) and that there is a possibility that the persons in question were excluded in 1954 as managers or superintendents. Having heard the evidence of Bruce H. Martin as to his duties and responsibilities as a senior cost clerk in 1954 and having reviewed the Examiner's Report on the duties and responsibilities of the estimators in 1978, there is no doubt in my mind that the 1954 decision was not based on the manager or superintendent exclusion. I further conclude that the deletion of the two categories from 1(3)(b) was mainly a matter of form as they were part of the phrase "exercise managerial functions".

3. The decision of the majority of the Board to rely on the statutory change in section 1(3)(b) and deny *res judicata* leads us to consider the duties and responsibilities of the cost estimators and cost analysts.

4. The Examiner's Report is very long and detailed, containing some 387 pages and from it the majority have concluded that an estimator is only a collator of information, that he decides almost nothing and operates within very narrow, predetermined limits.

5. I do not agree with this conclusion and I don't think the persons examined would either. I draw to your attention Mr. Goldie's reply when asked by the examiner to describe his everyday duties and responsibilities. (Page 141, line 27 to 35) of the Examiner's Report).

"My everyday duties include analyzing the costs on specific fuel-handling contracts, analyzing the costs on nuclear motors, preparing quotations for the sales and nuclear motors or their components, preparing quotations for fuel-handling systems, correcting accounting errors, doing review in estimates, forecasting budget costs of nuclear motors, controlling the costs in any other specific contracts which are assigned to me, advising my immediate supervisor or manager of situations in regard to costs that warrant more detailed analysis – I think that basically covers it."

6. Based on my analysis of the evidence, I conclude that the Cost Estimators (Classes 1 and 2) and Cost Analysts exercise managerial functions within the meaning of section 1(3)(b) of the Act.

1500-78-R Inga Toomes, (Applicant), v. Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Respondent), v. Charles Wilson Limited, (Intervener).

Termination – Company granting time off to allow employees to see lawyer not in all the circumstances sufficient for finding that application is involuntary

BEFORE: R. A. Furness, Vice-Chairman, and Board Members H. J. F. Ade and D. B. Archer.

APPEARANCES: *Indrek Uukkivi and Inga Toomes for the applicant; E. Posen and Bob Hill for the respondent; D. L. Brisbin and R. Aird for the intervener.*

DECISION OF R. A. FURNESS, VICE-CHAIRMAN, AND BOARD MEMBER H. J. F. ADE; January 22, 1979

1. The applicant has applied to the Board under section 49 of The Labour Relations Act for a declaration that the respondent no longer represents the employees in the bargaining unit for which it is the bargaining agent.
2. This application was filed on December 4, 1978. The employees who are affected by this application were covered by a collective agreement between the respondent and the intervener. This collective agreement became effective on September 30, 1976, and remained in effect until December 31, 1978. Having regard to the provisions of section 49(2) of the Act, the Board finds that this application is timely.
3. The statement of desire which was filed in support of this application was signed by each of the eight employees who are affected by this application. Five of these employees, Inga Toomes, Susan Trayling, Marilyn Peckford, Dorothy Michaud and Anita Mertens, testified before the Board with respect to the origination, preparation and circulation of the statement of desire.
4. It was the position of the respondent that the Board ought not to accept the statement of desire because it did not represent the voluntary wishes of the employees who signed it. In support of this position the respondent relied on certain incidents which occurred prior to and subsequent to the filing of this application. The respondent referred to the conduct of Abdul Mawji, the office manager. The evidence indicated that Mr. Mawji had been instrumental during the respondent's organizational campaign, which led to the certification of the respondent with respect to the employees affected by this application, in preparing a statement of desire in opposition to the respondent's successful bid for certification. The evidence also indicated that Mr. Mawji had been promoted to office manager shortly before this application was filed. The respondent referred to the fact that Mr. Mawji's permission had been necessary to secure time off to visit the lawyer who represented the applicant. The evidence also established that the five employees who testified before the Board also requested and were granted time off to visit the applicant's lawyer at the same time during a normal working day. The evidence also established that Marilyn Peckford and Dorothy Michaud approached Mr. Hawes, the general manager of the intervener, and Mr. Aird, the assistant general manager of the intervener, and asked for guidance in terminating the bargaining rights of the respondent.

5. The respondent did not file allegations of improper or irregular conduct with respect to the origination, preparation and circulation of the statement of desire. However, the respondent did draw certain inferences from the evidence, with respect to what it argued was the hand of management in the origination of the statement, and invited the Board to conclude that the statement of desire did not represent the voluntary wishes of the employees who have signed it.

6. The evidence establishes that Dorothy Michaud and Marilyn Peckford went to the office of Mr. Hawes. As chance would have it, Mr. Aird was also in Mr. Hawes' office at the time they entered. There is no suggestion that the meeting was pre-arranged. The two women asked Mr. Hawes for advice on how to dissolve the respondent. Mr. Aird said very little and Mr. Hawes told them to see a lawyer. During the course of a meeting which lasted some ten minutes, Mrs. Michaud and Mrs. Peckford wanted to discuss the benefits which they currently enjoyed and desired to know the benefits they would receive if the respondent was not representing them. The two men informed them that there was no way they would discuss these matters at all.

7. Mrs. Michaud and Mrs. Peckford did not have a lawyer but Mrs. Toomes was able to provide the name of a lawyer. Mrs. Peckford and Mrs. Toomes consulted this lawyer. In order to consult this lawyer an appointment was made towards the end of their working day. The two women asked Mr. Mawji for time off to see a lawyer. They did not tell him why they were going to see a lawyer. They were paid for the time off. Once the signatures had been affixed to the statement of desire Mrs. Peckford took it to the lawyer during her lunch hour.

8. Shortly before the first scheduled hearing the lawyer requested Mrs. Toomes, Mrs. Peckford, Mrs. Michaud, Miss Trayling and Mrs. Mertens to attend at his office. It appears that he wished to see each of the employees of the intervener who had witnessed one or more signatures being affixed to the statement of desire. An appointment was made for 4:00 p.m., some forty-five minutes before the end of their working day. Four of the women received permission from Mr. Mawji to attend at the lawyer's office and Mrs. Mertens received permission from her supervisor to keep the appointment. All five women informed their supervisors that they were going to see a lawyer. However, none of them stated why they were going to see a lawyer.

9. The respondent argued that the Board should consider the role of Mr. Mawji in opposing the respondent's successful organizational campaign some two years ago. The respondent pointed out that Mr. Mawji had been promoted from the bargaining unit to office manager during October or November prior to the filing of this application and that it was necessary for four of the witnesses to seek his permission to attend at the lawyer's office during working hours. The respondent argued that, while there was no indication that Mr. Mawji knew the intention of Mrs. Peckford and Mrs. Toomes in attending at the lawyer's office on the first occasion, the appointment occurred some time after Mrs. Peckford and Mrs. Michaud spoke to Messrs. Hawes and Aird about terminating the bargaining rights of the respondent. The respondent referred to the fact that on one occasion five of the eight persons in the bargaining unit sought and received permission to attend at the lawyer's office and pointed to the evidence of one of the witnesses that she assumed that Mr. Mawji knew why they were going. The respondent urged the Board to find that the statement of desire did not represent the true wishes of the employees because of the hand of manage-

ment in the circulation and the signing the statement of desire. The respondent relied on the *Armatage Motors Limited* case, [1970] OLRB Rep. April 69.

10. The meeting between Mr. Hawes, Mr. Aird, Mrs. Michaud and Mrs. Peckford was initiated by the two women and not by management. Mr. Hawes and Mr. Aird declined to respond with any advise on how to terminate the respondent's bargaining rights and told them to see a lawyer. Similarly, when Mrs. Michaud and Mrs. Peckford raised the question of present and future benefits, Mr. Hawes and Mr. Aird refused to discuss such matters. We are not prepared to find that such a contact with members of management in itself will destroy the voluntary nature of a subsequent statement of desire. The effect of such contacts must be considered in the context of the surrounding events and the response of management. We find nothing in the evidence with respect to this meeting which reflects upon the voluntariness of the statement of desire. Short of remaining mute and evacuating Mr. Hawes' office, there was little else that Mr. Hawes and Mr. Aird could reasonably have done. Mrs. Michaud and Mrs. Peckford had determined to rid themselves of the respondent and were seeking to hedge their bets. On the evidence before the Board they received no encouragement from the meeting.

11. The respondent concedes that at the time Mrs. Toomes and Mrs. Peckford requested permission to visit their lawyer, there was no indication that Mr. Mawji was aware of their intentions. Moreover, the evidence before the Board clearly establishes that the intervener has a practice of granting time off to the persons in the bargaining unit (all of whom are salaried) whether the reason relates to legal affairs, dental and medical appointments or other personal matters. Such time off is routinely given without any reduction in salary. The statement of desire was executed by the eight employees in the bargaining unit. While there are minor variations in the testimony of the witnesses with respect to the time that various signatures were affixed to the statement of desire, we are satisfied that the signatures which appear on the statement of desire represents the voluntary wishes of the employees who signed it.

12. The respondent relied heavily upon the fact that Mr. Mawji and another supervisor had permitted five of eight employees in the bargaining unit to have time off to see the lawyer who acted for them. The respondent stated that under such circumstances the intervener must have known of the purpose of meeting the lawyer and must therefore be taken to have had a hand in the statement of desire. We do not agree with the respondent's contention. While one of the witnesses stated that she assumed that Mr. Mawji knew why she was going to see a lawyer, the evidence before the Board does not establish the degree of his knowledge on the reason for visiting the lawyer. None of the employees told him why they were going to see a lawyer. In any event, the meeting in question occurred after the affixing of the signatures to the statement of desire. Even if it could be said that permission to see a lawyer constituted assistance by the intervener, the Board has frequently accepted statements of desire as voluntary where assistance was rendered to the petitioning employees after the statement of desire had been executed and filed with the Board. See, for example, the *Allan Johnston Limited* case, [1969] OLRB Rep. July 510; and the *Minut Car Wash and Garage Limited* case, [1960] OLRB Rep. January 351, where the Board held that financial assistance by an employer to an employee who appeared on behalf of objectors could not affect the weight to be given to the desires of the employees who signed the statement of desire because the financial assistance had been given after the statement of desire had been formulated, signed and filed with the Board.

13. The *Armatage Motors Limited* case, *supra*, is readily distinguishable from the facts of the instant case because it involved the circumstances surrounding the execution of a statement of desire. At paragraph 4 the Board stated:

Since the Board is concerned with the voluntary wishes of the employees we are of the opinion that in these circumstances any employee who remained on the premises while the remaining employees left the premises to sign the Statement of Desire, would be subject to the scrutiny of the foreman. In these circumstances it would have been extremely difficult for an employee to refuse to attend to sign the Statement of Desire knowing that such refusal might come to the attention of Management. In addition it would appear that permission having been obtained for and on behalf of these employees that the employees would be under the impression that Management approved and consented to their actions. In these circumstances we are not prepared to accept the Statement of Desire as reflecting the voluntary wishes of the employees.

The facts in the instant case are quite dissimilar. The employees who are affected by this application have always been permitted a wide degree of latitude in absenting themselves for personal matters during the course of their employment. On one occasion more than five employees absented themselves for a farewell luncheon. In addition, as has been stated earlier, the attendance at the lawyer's office was not for the purpose of signing the statement of desire but was for the purpose of seeking counsel once the statement of desire had been executed and filed with the Board.

14. On the basis of the evidence and representations before it, we are satisfied that not less than forty-five per cent of the employees of Charles Wilson Limited in the bargaining unit, at the time the application was made, had voluntarily signified in writing that they no longer wish to be represented by the respondent trade union on December 12, 1978, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent trade union under section 49(3) of the said Act.

15. We direct that a representation vote be taken of the employees of Charles Wilson Limited. Those eligible to vote are all office employees of Charles Wilson Limited at Metropolitan Toronto, save and except confidential secretary to the general manager, office manager, persons above the rank of office manager, office supervisor, foremen and sales supervisors, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period, chemists and quality control persons, and employees covered under an existing collective agreement with the Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

16. Voters will be asked to indicate whether or not they wish to be represented by the respondent in their employment relations with Charles Wilson Limited.

17. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER D. B. ARCHER:

1. There is no question that the company was a party to the petitions. Mr. Mawji, now a supervisor, was the petitioner against the union in the certification proceedings. Mrs. Toomes received time off with pay to see a lawyer. Later five of the eight employees were given time off with pay to attend the lawyer's office. She was also paid for attending the last Board hearing.
2. It is unconceivable that the company would not know the purpose of the visit of the five employees to a lawyer's office.
3. There is no doubt in my mind that the company has contributed financial and other support to the petitioners and a vote at this time will not ascertain the true and free wishes of the employees. There I would have dismissed the application.

1465-78-U 1547-78-U 1548-78-U Amalgamated Meat Cutters and Butcher Workmen of North America, (Complainant), v. **Cuddy Food Products Limited** (London, Ontario), (Respondent).

S-79 – Consent to Prosecute – Union unfair practice complaint sustained but Board refusing to grant consent to prosecute

BEFORE: M. G. Picher, Vice-Chairman, and Board Members J. D. Bell and W. F. Rutherford.

APPEARANCES: *Chris Trower, Don Dayman and Vince Gentile for the complainant; F. J. Murphy for the respondent.*

DECISION OF THE BOARD: January 25, 1979.

1. These complaints are filed under section 79 of The Labour Relations Act, alleging that three employees of the respondent, Anne Bauer, Deonilia Coetano and Maria Martins were discharged for union activity. The complainant alleges that their terminations were in breach of sections 3, 58 and 71 of the Act and asks that they be reinstated with compensation for monies lost and that the Board order the respondent to cease and desist from interfering with the rights of its employees under The Labour Relations Act. By Board file 1548-78-U the applicant has requested the Board's consent to prosecute the respondent employer for the alleged breaches of the Act.
2. The respondent is engaged in processing and marketing turkey meat. Anne Bauer was employed by the respondent for some two years. In November of 1978, she was absent from work for three days due to illness. On the third day she was fired. Mrs. Helen Snyder, a personnel officer with the respondent advised her of that fact over the telephone. Mrs. Snyder testified that Mrs. Bauer was discharged because she had not called in sick and the plant rule is that an employee who is absent two days consecutive without calling in is subject to

discharge. No such rule, however, appears among the posted plant rules which were filed in evidence.

3. The Board accepts the evidence of Mrs. Bauer that she did call the plant when she was absent and advised the receptionist that she was ill. In that regard the Board notes that Mrs. Snyder did not check with the receptionist to see whether a call had been received from Mrs. Bauer before firing her. In her testimony Mrs. Snyder sought to further justify the decision to discharge Mrs. Bauer on the strength of her high rate of absenteeism between August and November of 1978. Much of that absenteeism was due to a back problem; on the occasion of her final three day absence Mrs. Bauer was suffering from acute diarrhoea due to a bowel infection. The evidence establishes that she had always provided satisfactory medical documentation for her absences and that she was under a doctor's care for the infection she was suffering from at the time of her discharge. It is also clear from the evidence that the employer did not take into account her attendance record prior to August of 1978 nor did it attempt to ascertain the nature of her ailment at the time she was fired. That would be done, normally, in order to determine whether her illness was such that her attendance level would return to normal before a decision could be taken to discharge her. In other words management did not make a thorough check to see whether Mrs. Bauer had called in to explain her absence, did not seek to ascertain the nature of her illness before discharging her and then summarily fired her for being in violation of a rule that appears never to have been made or, at the least, brought to the attention of the employees.

4. Against that background the union asks the Board to consider the evidence that not long before her dismissal Mrs. Bauer testified in support of the union in proceedings before this Board.

5. Deonilia Coetano and Maria Martins were dismissed together on November 24, 1978. The evidence establishes that Mrs. Coetano frequently worked on a machine that produced turkey burger patties. On November 24, 1978 she was working on that machine when her supervisor told her to leave that post and work at a table making turkey roasts. Mrs. Coetano was not pleased with that change of assignment and she then told her supervisor that she always gave the best jobs to Canadians and the worst jobs to Portuguese employees. This apparently upset the supervisor and a few minutes later Mrs. Coetano was called to the office of Mr. Roger Schuler, the respondent's production manager. Mr. Schuler then told Mrs. Coetano that she was a good worker but because of her remark she was fired. The evidence also establishes that management then knew that Mrs. Coetano was active in the union and that by a registered letter dated 3 days prior to her dismissal the company was advised that she was a member of the union's bargaining committee. It appears that in fact she was elected plant chairman of the union on November 16, 1978. She also testified on behalf of the union and against the employer in prior proceedings of this Board.

6. The evidence establishes that Maria Martins was a good employee without any disciplinary record over two years of service with the respondent. On November 23, 1978, she had a verbal disagreement with her supervisor. Her supervisor told her that she had been doing nothing for 15 minutes and that she would therefore lose that time on her payroll. She responded that she would inquire at the next union meeting whether the company was entitled to do that. The next day she was fired by Mr. Schuler on the strength of that incident for allegedly upsetting her supervisor.

7. In a complaint under section 79 of the Act the burden is upon the employer to satisfy the Board that anti-union animus played no part in the discharge of its employee. It is incumbent upon the employer to give a credible account of its action to establish that there was no anti-union motive, in whole or in part, as a basis for the discharge (*Regina v. Bushnell Communications Ltd.* (1973) 1 O.R. (2d) 442 (H.Ct.) upheld, (1975) 4 O.R. (2d) 288 (C.A.), *Pop Shoppe (Toronto) Limited* [1976] OLRB Rep. June 294)).

8. Anti-union motive is, of course, seldom admitted by an employer and often the Board is required to draw inferences in that regard based on the preponderance of evidence. In doing that the Board may have regard to the reasonableness of an employer's actions in the whole of the circumstances. in *Zehr's Markets Limited* [1971] OLRB Rep. Jan. 39 the Board expressed itself, at page 43, as follows:

When determining the bona fides of the reasons announced by the employer, it is helpful to assess the reasonableness of the employer's actions in light of all the circumstances. If the employer's actions are unreasonable or unduly harsh and it is established, as in this case, that the employer had knowledge of the union activity which he opposed, the fact that the employer's actions were unreasonable or unduly harsh would cast serious doubt on the validity of the reasons advanced by the employer for the discharge.

9. In the Board's view those principles are pertinent to this case. The evidence establishes that within a short period of time three employees described as good workers were discharged in circumstances that suggest unduly harsh treatment. Mrs. Bauer was discharged for absenteeism and for failing to call in on the basis of a rule that apparently did not exist, and without any investigation into whether she had in fact called in. The employer made no inquiry into the nature of her illness or the projected date of her return, and apparently had no regard for her good attendance record in 1977 and the early part of 1978, nor for the quality of her work during that time. Maria Martins was a good worker without any disciplinary record whatsoever, but she was summarily fired on the strength of a single comment to a supervisor to the effect that she would direct an inquiry to the union. Mrs. Coetano was similarly discharged at the same time for an adverse comment made to her supervisor at a time when the employer knew that she was active on the union's behalf. Union support, the employer's knowledge of it and otherwise inexplicable harshness are the three common threads running through the discharge of each of the grievors in this complaint.

10. In these circumstances and having particular regard to weaknesses and inconsistencies in the testimony of Mrs. Snyder and Mr. Schuler concerning certain plant rules which appear to be self-serving *ex post facto* creations, the Board does not accept as credible the reasons advanced for the discharge of the three grievors and finds that the motive for their discharge was their association with the union.

11. The grievors shall therefore be reinstated in their employment, with compensation for wages and benefits lost from the time of their discharge to the time of their reinstatement. The Board shall remain seized of this matter in the event of any disagreement between the parties regarding the quantum of damages or any other aspect of the implementation of the Board's order.

12. We turn now to the request of the applicant union for consent to prosecute the respondent. The granting of consent to prosecute is a matter within the discretion of the Board as described in section 90 of The Labour Relations Act. The Board will generally decline its consent to a criminal prosecution unless it is satisfied that that extreme recourse is necessary to advance the relationship of the parties or to protect the interests of collective bargaining generally in the province (*Arthur G. McKee and Company Canada Limited* [1976] OLRB Rep. Oct. 637; *Fleck Manufacturing Company* [1978] OLRB Rep. July 615).

13. In this case the parties are new to their relationship and it is fair to say that the birth of that relationship has not been smooth. An initial application for certification was dismissed for a want of integrity in the membership evidence filed (Board file 0466-78-R, October 4, 1978). On a subsequent application a certificate was granted in proceedings marked with considerable resistance by the employer (Board file 1164-78-R, November 15, 1978). These and other section 79 complaints were filed with the Board. It is hoped that the disposition of the section 79 complaints will clear the air and allow the parties to put the past behind them and move forward to a positive bargaining relationship. It would be premature at this time to conclude that the remedies under section 79 of the Act are not sufficient to re-orient the parties in their future dealing with each other. A criminal prosecution would only risk further deterioration of their bargaining relationship at a time when they should be exploring more positive avenues of understanding. The request for the Board's consent to institute a prosecution is therefore denied. For the same reasons the Board deems it inappropriate to issue a cease and desist order against the employer at this time.

1053-78-U, 1054-78-U Canadian Food and Allied Workers Union Local 633, chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America, ALF-CIO-CLC, (Applicant), v. Ontario Food Division (**Food City**) of the Oshawa Group Limited and Robert Parker and David Jenkins and Gerald Pilon, (Respondents).

S-79 – Concerted anti union campaign by employer found to be breach of section 56, 61 and 70 of Act

BEFORE: E. Norris Davis, Vice-Chairman, and Board Members J. D. Bell and W. F. Rutherford.

APPEARANCES: *Harold F. Caley and Frank Kelly for the applicant; George Grossman, Clare Hardy and Chuck Candy for the respondents.*

DECISION OF THE BOARD: January 9, 1979

1. These are applications for consent to prosecute and for remedial action under section 79 of the Act alleging contraventions of sections 56, 58, 61 and 70. Upon agreement of the parties the Board ordered the consolidation of the two files.

2. The applicant has engaged in a province-wide organizational campaign of the respondent company's retail food operations resulting in applications for certification in five locations. The facts giving rise to the current proceedings arise out of organizational activities at the respondent's Brantford location which culminated in an application for certification heard before another panel of the Board on August 8, 1978 and resulting in an interim certificate being issued covering certain full-time employees of the meat department. The complaints are founded in the alleged activities of the respondent employer and individual management representatives following the filing of the above-noted application for certification and continuing after an oral decision of the Board to issue an interim certificate.

3. Robert Parker, Manager of Employee Services works out of the respondent's head office in Toronto and reports to the Director of Personnel. He testified that, as part of his responsibilities, he was involved in processing this, and other applications for certification, through personally posting the required Notice to Employees and assembling the necessary employee information required by the Board. The application for the Brantford location was received in Toronto on July 25, 1978 and at about 4:30 p.m. that day Parker phoned David Jenkins, Brantford's Store Manager to advise him that he had a document which he would bring to Brantford next morning.

4. The applicant has alleged a contravention of section 56 of the Act by the respondent employer and the individual respondents by virtue of their alleged involvement in organizing employee opposition to the certification application and related activities.

5. The evidence before the Board and the direct contradictions between witnesses in several key facets raises a question of credibility. Donald Wright, Assistant Meat Manager, and a member of a bargaining unit of three persons, testified that a statement of desire, filed with the Board in the certification proceeding, had its genesis in the suggestions of one, Robt. Parker, the respondent's Manager of Employee Services (and an individual respondent) and that he (Wright) was counselled and assisted in the implementation of that suggestion by one, David Jenkins the respondent's Brantford Store Manager (and also an individual respondent).

6. Wright, Assistant Manager of the Meat Department and a member of the bargaining unit testified that he arrived at the Brantford store at 7:45 a.m. on July 26th and Parker was then in front of the Bakery Counter. Wright states that Parker had a folder which he said contained a document for certification and asked Wright if he had seen one before to which Wright said, "No". He states that Parker read the applications (actually the Notice to Employees of an application) and in Wright's words "when it came to the part about petition he emphasized on it by reading it twice and asked if Wright understood what it meant". Wright replied that he did not understand it and Parker stated "the only way to stop the union is to get a petition against it" and suggested that Parker write one up and get everyone in the Meat Department to sign it. In response to Wright's statement that he had no idea how to go about it Parker stated that he would help. Wright states that, as he was going to get behind in his work, preparatory to the 9:30 store opening, he then asked Parker to write out a petition and to leave it for him with Jenkins the Store Manager to which Parker agreed. Wright states that Parker "asked continuously if I knew who had signed union cards" and he replied "he didn't because I thought if I admitted it I would be fired". Wright states that the discussion with Parker went on for about an half hour, "off an on".

7. Wright also testified that after Parker had left the store that morning about 10:30 a.m. Wright went to Jenkins' office and enquired of him if Parker had left the petition that he wanted Wright to write up, whereupon Jenkins said that it was in his briefcase and took it out. Wright states he then copied the proposed petition language, Jenkins tore up the original and discarded it. Wright states that at this time Jenkins enquired if he had any idea who had signed union cards and "wanted him to find out if Nancy Adams had signed".

8. The evidence of Parker and Jenkins as to how the petition form came into existence is quite different than that of Wright. Parker, who had been involved in the employer's processing of four other certification applications by the present applicant, testified that he had developed a standard procedure of attending at the store in question, discussing the matter first with the Store Manager and the Meat Department Manager, and then posting the Notice and gathering needed employee information for filing of a Reply. Parker states that he met Wright in the store on July 26th at 7:45 a.m., ascertained that Wright was in charge by virtue of Pilon the Department Manager being on vacation, told him he had a very important document in his file which was an application for certification and that when Jenkins, the Store Manager arrived the three of them would get together and peruse the document. Parker states the conversation lasted for 4-5 minutes and, in evidence in chief, when asked if he had shown Wright the document his response was that "it would be ridiculous to assume he would" which response, in cross-examination, he amended to "I am clarifying right now that he did not have full access to the document". Parker denies any discussion about a petition or enquiry about union membership at this meeting.

9. Jenkins testified that he arrived at the store at 8:15 a.m. and that Parker was then standing in front of the meat counter and that Wright was working preparing the counter. According to Jenkins and Parker, they and Wright then went to Jenkins' office where Parker placed the Board's document on the desk and invited the other two to read it so they would be knowledgeable if any questions arose. Both Jenkins and Wright are said to have expressed lack of understanding after having read the document and Parker invited them to read it again following which Wright stated he "wanted no part of the union" and Parker then drew attention to paragraphs 4 and 5 of the document stating that if Wright really felt that way he could, by following those instructions, form and file a petition against it. That was the end of the meeting at about 8:35 a.m. according to Parker and Jenkins. Wright testified that no such meeting had taken place and that he had never attended any meeting in Jenkins' office at which Parker and Jenkins were present.

10. After posting the Notice to Employees (which we will deal with in detail later) Jenkins and Parker testified that they returned to Jenkins' office and were there (except for an absence for coffee) between 10:15 a.m. to 11:10 a.m. Jenkins first question of Parker at this time (according to both Parker and Jenkins) was "what is a petition like" to which Parker replied that he didn't know as he had never seen one but he supposed, "it would look something like this" whereupon he scribbled a few words on a piece of paper and pushed it over to Jenkins who put it with his other papers.

11. According to Jenkins it was after lunch that day that Jenkins came to his office and informed him that he was getting a petition to go against the application but, he did not know how to go about it and was having trouble with the words and the spelling. It was Jenkins' evidence that they both sat down and individually tried to draft language. Jenkins recollection of whether Parker's draft played any part was most hesitant and hazy. Having re-

gard to the level of erudition indicated by the language of the petition and an opportunity to observe both Jenkins and Wright, the Board is satisfied that it was indeed the Parker draft which had been copied, and we prefer Wright's evidence over Jenkins as to the timing and content of this meeting, and, therefore, conclude that Wright went to Jenkins' office at 10:30 a.m. expecting to find a "draft petition" left by Parker which he did. Such a finding is consistent with Wright's version of the early morning meeting with Parker, which version we accept over Parker's version. Jenkins' testimony that when he arrived at the store at 8:15 a.m. Parker was in front of the meat counter where Wright was working makes it more likely to us that the early morning conversation did extend "off and on" for half an hour. Additionally, we find it hard to accept in the Parker-Jenkins version the statement by Parker that he had never seen a petition in view of his own testimony of an involvement in the processing of a number of applications in some of which petitions were involved.

12. Parker and Jenkins testified that the actual posting of the Notice to Employees took place at 10:00 a.m. July 26th. Wright and Adams gave evidence that it was at 9:15 a.m. Wright fixed the time by the fact that there had been a discussion at the posting about the time because Parker said he would write it down. The return of posting card to the Board, completed by Parker, indicated the time of posting as being 10:00 a.m. July 26th. Parker states he completed this form in Jenkins' office immediately following the posting. The form, itself, shows it to be dated at Toronto on July 27th, and Parker was unable to offer an explanation for this. The Board believes the posting did, indeed, take place at 9:15 a.m. and that the subsequent events were sequenced as outlined in Wright's evidence.

13. The evidence was not in dispute that, present at the posting were Parker, Jenkins, Wright and Adams, with the latter not being in the immediate area, but some short distance away. According to Adams she was not in a position to hear any conversation co-incident with the posting. Parker states that, on posting, he said that the document must be left posted so that each staff of the Meat Department could read and understand it, and that it was a very important document for them to consider and that he invited everyone to read and understand it. Adams testified that, after the notice was posted, Parker called her over, asked her to read it and if she understood it, and at that time no one was present except herself and Parker. Adams states Parker commented that someone had signed cards for the union and "if I changed my mind later on Don Wright would be coming around with a petition and all I would have to do was sign the petition". Parker denies any such meeting or conversation at that or any time.

14. Jenkins and Parker testified that following the posting they returned to Jenkins' office and it was then that Jenkins asked "what a petition was like". They also set in motion gathering information required regarding hours of work of employees and signatures and then went for a second coffee break around 10:20 or 10:30 a.m. and Parker departed from the store around 11:15 a.m.

15. Wright proceeded that day to get the petition signed by the other employees in the Meat Department and when Jenkins came into work on July 27th, according to Wright he enquired if the petition had been all signed which Wright confirmed. Wright states that about 2:00 p.m. on July 27th, Jenkins enquired whether he had a lawyer and told him he would have to phone his lawyer, read the petition over to her and make sure "it was legal and right". Jenkins in his testimony could not recollect when this took place but agreed it was probably July 27th, but states he made the suggestion because Wright had expressed doubt about whether the petition was "right".

16. Wright and Jenkins went to Jenkins' office and phoned Wright's lawyer who was busy and Wright "left word". The call was returned about 4:30 p.m. and Jenkins called Wright to the office to take the call. Wright explained "we have a petition against the union and wondered if it was legal". Wright states Jenkins was then sitting beside him and when he used the pronoun "we" Jenkins said "I", "I". The lawyer approved the petition and said there would be no charge because she would not be involved in it. Jenkins' recollection of these events was vague and general and Wright's testimony direct and straight-forward.

17. On July 28th, at noon hour, Wright went to Jenkins' office to get an envelope to mail the petition to the Board. While Wright addressed the envelope, Jenkins read the petition. As Jenkins was about to visit the Miracle Mart store for a weekly competitive check and the Post Office was contiguous to it, he offered to drive Wright over, which he did. Wright registered the letter while Jenkins waited for him, they had lunch, and checked Miracle Mart. Wright states that when he addressed the envelope he had not finally decided to mail it but, when Jenkins escorted him to the Post Office he had no choice but to mail it.

18. The certification hearing was held on August 8, 1978, at which time Wright was on vacation and he did not appear at the hearing because, in his words, "I was going to make a liar and fool out of myself because I wanted a union strictly out of fear". Wright states he was aware he should appear at the hearing as he had been so advised by Parker on July 26th, as well as, that he would have to swear that the company had had no involvement in the petition. At the hearing the Board indicated orally that an interim certificate would issue.

19. Wright returned to work on August 14th, and took a half hour lunch period and returned to work. Pilon, the Meat Manager, pointed out to him that lunch period was one hour and if there was a union you had to take the hour. Wright thereupon spent the next half hour in the lunchroom. Wright states that later in the afternoon Pilon approached him and accused him of organizing a union in the store which Wright denied and stated he did not know the union was in, to which Pilon replied "I don't care whether the union is in or not. You'll still do as I say because I am the boss".

20. On August 17th, Parker arrived at the Brantford store as part of a general visitation of stores to introduce Hardy, the newly appointed Director of Personnel. Parker introduced Hardy to Wright, said he wanted to talk to Wright and started walking towards the Cooler with Wright following and Hardy remaining where he was. Once inside the Cooler, Parker said, (according to Wright) "I hope you are very proud of yourself" and asked Wright how long he had been employed, receiving an answer "nine years". Wright states Parker wanted to know why he hadn't appeared at the hearing but wouldn't listen to Wright's explanation saying he didn't want to hear anymore and left after saying, "Don, you are one small man in a large company. How can you sleep at night after what you have done?". Parker denies this latter comment.

21. After the incident, Wright was in touch with a union representative and gave him a statement. When asked whose idea it was to circulate the petition, Wright said, "Not mine. It was Parkers," and we did circulate out of fear because if we didn't they would know instantly we had signed union cards".

22. Parker stated that his reason for speaking to Wright in private in the Cooler was

because he felt that he had been "set up". When asked "why?" Parker explained that Wright had spoken to him in such definite terms in Jenkins' office to the effect that he wanted no part of the union, that it was obvious he was playing two roles. Parker denies referring to Wright's absence from the hearing but that Wright said, "Mr. Parker I did not know I should appear at the hearing" and Parker responded, "Don, please don't lie anymore, we've had enough of that". Parker denied the statements about "sleeping at night" and Wright being "a small man in a big company". In cross-examination when asked how he thought Wright had deceived him, he stated, "because I had heard a document had been forwarded" and further that his enquiry as to Wright's length of employment was because he "wanted to know" and was not intended to be threatening.

23. On August 4th, 1978 a letter over the signature of Mr. C. E. Candy, Vice-President Corporate Stores was written and distributed to employees with their pay cheques. The letter was addressed to "all employees at Brantford, Niagara Falls and St. Catharines, and informs them that they will not participate in the Annual Compensation Review until the certification application was disposed of. The letter states that the company was precluded by The Labour Relations Act from altering wages etc. because of the application. Wright and Adams testified that following the August 4th letter they were subjected to some hostility from employees in other departments who blamed the union for this postponement of a wage adjustment. On October 5th, 1978, a further letter from Candy was similarly distributed and was addressed only to "all full-time employees Brantford Food City". This letter states that an interim certificate had been issued but the position of the Meat Manager would be the subject of an Examiner's report and, for that reason, the company was unable to grant these employees the same wage consideration as had been extended to other Food City employees.

24. On the afternoon of Tuesday, August 8th, Adams testified that Pilon, the Meat Manager, spoke to her on her return from coffee break which she had overstayed by 5-10 minutes. Pilon said "From now on things are going to change around the store. Fifteen minutes exactly for coffee from now on. No more smoking in the back room". Adams states that she had never been previously approached about these matters. Adams further testified that at quitting time Pilon came to her and asked if she knew the union was in the store and she replied in the negative. Pilon stated that that was the reason for his being mad about the break. Pilon then asked her if she had signed a union card which she denied. The same question was put to her again on the following day with the same response. On Friday, August 11th, when again asked that question by Pilon, Adams states she finally admitted it and Pilon stated he had already known anyway as the company had seen the signatures at the Board hearing.

25. Pilon admits the questioning of Adams and when asked why he kept questioning Adams he stated it was "just curiosity"; when asked how he intended to use the information his response was "just to have it in my brain". Following Adams admission of her union membership there was a further discussion between she and Pilon in which Adams indicated she had signed because Wright had and for "job security". According to Pilon, which is denied by Adams, Adams indicated that she thought the union was somehow part of the company and when told it wasn't she stated she must have made a mistake and asked how she could get out of the union. Pilon testified that he then told her "the only way I knew was for her to quit. I might have been a little sarcastic at the time". Adams also testified that what Pilon said was, "If I wanted to back out of the union that I could get out of it if I quit.

If it quit the union would be thrown out and then I would be hired back. He said if I wanted to I could talk to Don Wright about backing out also”.

26. On Saturday, August 12th, the work schedule was posted for the following week and, included the scheduling of Wright to work Saturday night which was the first time in five years that he had been so scheduled. Both Wright and Adams have been scheduled, in rotation with part-time employees to work Saturday nights since that time. The evidence is not in dispute that, prior to this time, no one other than part-time employees had been scheduled for Saturday night work although, Adams has worked on a Saturday night in connection with annual inventory and also when a scheduled part-time employee has failed to show up. Following posting of the above schedule Pilon enquired of Adams “what Don Wright thought about working Saturday nights” and she replied, “Nothing”.

27. Pilon states that the Saturday night scheduling arose partly because a part-time employee who had regularly worked that night had quit and, also because there was a major store renovation scheduled and it was desirable, as a part of that, that extra cleaning be done beyond the weekly routine, and that in any event it is a good thing to have “key employees” involved from time to time.

28. There was clearly employer interference in the formation of the union contrary to section 56 of the Act. The continual questioning of employees about membership and the intimidating and coercive conduct engaged in, is in clear contravention of section 61 of the Act. The evidence discloses a comprehensive program by the respondent company, and involving the individual respondents, of interference with the exercise of employee rights under the Act. This program was initiated concurrent with the filing of the application for certification, with the intent to interfere with the formation of the union and despite its lack of success in that regard, continued after the time when the respondents had been orally advised by the Board of the issuance of an interim certificate and indeed, after the issuance of the formal interim certificate. It is obvious that this employer has seized on every opportunity to not only indicate that it views with disfavour participation by its employees in union activities but, to communicate to employees that such participation can adversely affect their economic and employment status.

29. The Cooler incident with Parker and Wright in our view was intended as a clear signal to Wright that his union activity could affect his employment relationship. Pilon’s questioning of Adams regarding union membership was not only improper but, his suggestion that Adams and Wright terminate their employment to get rid of the union exhibits an attitude of disregard of the legislation which is fortunately not held by many employers. Perhaps most disturbing is the communication from a Vice-President of the respondent company which, by using an interpretation of the freeze of conditions prescribed by section 70 of the Act to extend to employees, completely and obviously unaffected by the proceedings, and which communication could only have the objectives of having unaffected employees bring pressure on the affected employees in respect to their union activities, and to send a subtle signal to the unaffected employees that the exercise of rights under the Act can result in adverse changes within the employment relationship.

30. Finally, the change in work schedules practice immediately following the oral pronouncement of an interim certification, so that full-time employees who have never previously been scheduled for Saturday night work will not be so scheduled can only be inter-

puted as a punitive measure in response to the employees joining a union rather than being motivated by normal business reasons.

31. The Board finds that the respondent company through its representatives and co-respondents, Parker and Jenkins, contravened section 56 of the Act which reads:

56. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

32. The Board further finds that the respondent company through its representatives and co-respondents Parker and Pilon, contravened section 61 of the Act which reads:

61. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

33. The Board further finds that the respondent company through its representatives and co-respondent Pilon, contravened section 70 of the Act which reads:

70.-(1) Where notice has been given under section 13 or section 45 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

(a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,

(i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or

(ii) fourteen days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board,

as the case may be; or

(b) until the right of the trade union to represent the employees has been terminated,

whichever occurs first.

(2) Where a trade union has applied for certification and notice thereof from the Board has been received by the employer, the employer shall not, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer or the employees until,

- (a) the trade union has given notice under section 13, in which case subsection 1 applies; or
- (b) the application for certification by the trade union is dismissed or terminated by the Board or withdrawn by the trade union.

34. The Board orders and directs that the respondent company and its co-respondents cease and desist from all future conduct violative of sections 56, 61 and 70 of the Act.

35. The Board further orders and directs that full-time employees of the Meat Department be restored to the schedule of working hours in effect as of the date of the application for certification by not scheduling such employees to work on Saturday nights.

36. In respect of the Application for Consent to Prosecute, the Board is of the opinion that no industrial relations purpose is to be served by the granting of such consent particularly in view of the remedial relief granted and designed to restore stability in industrial relations within the framework of *The Labour Relations Act*. The Board, therefore, declines to exercise its discretion to grant such Consent.

1566-78-U Indalloy, Division of Indal Limited, (Complainant), v. United Steelworkers of America, Local 2729 and Mr. Fortunato Rao, (Respondents),

S-79 – Duty to Bargain in Good Faith – Union agreeing to recommend settlement for ratification in belief that settlement comparable to settlement similar but not identical – Union subsequently having second thoughts and declining to recommend ratification – Union’s conduct ill advised but in circumstances not improper

BEFORE: E. Norris Davis, Vice-Chairman, and Board Members J. D. Bell and W. R. Rutherford.

APPEARANCES: *B. R. Baldwin, John Blocha and Leon Kozierok for the applicant; Lorne Ingle, Fortunato Rao and Doug Last for the respondent.*

DECISION OF THE BOARD; January 10, 1979

1. This is a complaint alleging a contravention of Section 14 of the Labour Relations Act by the respondents. The facts giving rise to the complaint arise out of negotiations for renewal of the collective agreement existing between the complainant and the respondent union.

2. The complaint centres on an undertaking given by the union negotiating team to recommend acceptance by its membership of a tentative agreement, and which undertaking was not fulfilled. There is no dispute as to the giving of the undertaking nor of its non-fulfilment but the respondents take the position that the undertaking was given on a mistaken assumption of which they only became aware immediately prior to the membership meeting held for ratification.

3. The complainant company is part of the Indal corporate group as is another company identified as "Indalex". Both the complainant and Indalex have separate collective bargaining relations with the respondent union and a renewal collective agreement had been negotiated at Indalex prior to commencement of negotiations at Indalloy. The spokesman for the Indalloy company negotiating team and for the Indalloy union negotiating team had also participated in the renewal negotiations at Indalex.

4. The Board was told that the Indalloy contract now under negotiation contained most of the same language as in the then existing Indalex agreement and "slightly better" wages. The proposals for renewal negotiations tabled by the union were almost identical at both firms.

5. An initial bargaining session was held at Indalloy on November 7, 1978 and resulted in resolution of some language proposals and the tabling by the company of an initial wage offer and a counter wage proposal by the union. The meeting was then adjourned till November 29th to permit assessment of positions.

6. On November 29th the parties arrived at a point where the company was prepared to make a final wage offer which would compare favorably with the Indalex settlement, and preparatory to so doing sought an assurance from the union negotiating team that such an offer would be acceptable to them and would be recommended for acceptance by the membership. With receipt of that assurance the company tabled its final proposal, given to the union in writing. The written proposal amongst other items, set out the wage schedule by classification for each of three years and was stated by the company spokesman to compare favorably to the Indalex structure and specific attention was drawn to the end rates in the third year and to two specific classifications in which the Indalloy settlement would exceed that at Indalex. The union team caucused for some forty-five minutes. On the union's return they raised three additional points, namely, settlement of some outstanding grievances which were ultimately agreed to be settled outside contract negotiations: making shift premium changes effective in the first year of the contract instead of in the third year, to which the company agreed: and some modification in a company wash up time proposal which was also accepted by the company.

7. At this point the parties indicated that there was agreement and that the Union Committee would recommend the settlement at a meeting to be held Sunday, December 3, 1978. Following a grievance meeting held on December 1st, Mr. Fortunato Rao, an International Representative of the Steelworkers and Union spokesman in the negotiations provided Mr. John Blocha, President of the complainant and a member of the company negotiating team, with a typewritten copy of the company proposal which he stated would be handed to the membership on Sunday. Rao at that time reaffirmed that he considered it a good package and that he would recommend its acceptance.

8. On Sunday, December 3, 1978 Rao was involved in a union meeting not concerned with the Indalloy matter and, which meeting overlapped slightly the time for which the Indalloy meeting had been called with the result that the Indalloy meeting was twenty minutes late in starting.

9. Prior to the start of the Indalloy meeting, Mr. Doug Last, a member of the union negotiating committee at Indalloy, discussed the Indalloy settlement with one, Brando Paris, President of the local union and an employee of Indalex, who had been invited by Rao to attend the ratification meeting. Last showed the tentative agreement to Paris and Paris pointed out some differences in rates between that agreement and the Indalex agreement at which point Last said, "This doesn't go. I can't recommend it". Last and Paris then pinpointed the differences to Rao and Rao's response was that he hoped to correct the problem with the company but that they would go ahead with the meeting which was already late.

10. At the membership meeting when discussing the proposed wage schedule Rao told the meeting that they had discovered that they had received less money than Indalex: that the interpretation of management and himself had been that "it was as good and I find it is not so". Rao then pointed out that the Indalloy settlement was 5¢ less in the second year, and somewhat less in the first year and said "under these circumstances we cannot recommend it". A secret ballot vote to accept the settlement or to strike resulted in a unanimous rejection of the settlement.

11. Rao then phoned Blocha, in accordance with a pre-arrangement, and informed him of the result and explained his change of position as "on the basis that up until noon today I took for granted that we had same wages as Indalex but we find out they are less" and suggested that the parties try to resolve it as soon as possible by a meeting the following day or on December 20th, the next available date. Blocha stated he would get in touch with the company spokesman and subsequently advised Rao that the meeting would have to be December 20th. Rao returned from vacation December 20th and found a message from the company spokesman that he would not be available on December 20th. Rao spoke with the company spokesman the following day at which time he was informed that the instant application had been filed and that there would be no meeting.

12. It is clear that negotiation discussions were in the general framework of the Indalex settlement although the agreed proposals of November 29th also clearly indicate that this did not mean that either language or economic working conditions were identical. It was a result of the Last-Paris discussion of December 3rd that the union negotiating committee then concluded that their tentative agreement which they had agreed to recommend did not compare favorably with the Indalex settlement. This was a change from their evaluation of November 29th. Thus, despite the fact that Rao had participated in the Indalex settlement and that all members of the union negotiating committee had copies of that settlement and indeed supplied a copy of it to the company spokesman on November 7, 1978. It is also of some significance that the union negotiating committee on November 29th when it caucused to consider the company proposal took with it a detailed written statement of that proposal although, both Rao and Last testified that during this caucus they made no effort to compare the Indalloy and Indalex wage schedules. Rao states that because the company spokesman dwelt on the rates of classifications which, in the third year at Indalloy, were better than Indalex, that he (Rao) took for granted that everything was better. Last testified that no comparison of wage schedules was made before December 3rd because they accepted the company statement that the overall package was better than Indalex.

13. We accept the explanation of Rao and Last at face value. Nonetheless, we must comment that we find it unusual for an experienced negotiator such as Rao is, and who, in this case, had intimate knowledge of the details of the Indalex settlement, which was the agreed upon yardstick for measuring the Indalloy offer, to not have directed his attention to making a total comparison. It is also obvious to the Board that the pressure of time on December 3rd resulted in a concentration by Rao and the committee on specific items which were less than the Indalex levels and not on a comparison of total packages.

14. The Board is not prepared to characterize the conduct of the union as an absence of good faith such as is required by Section 14 of the Act. There is little applicable jurisprudence available on this point and Counsel were unable to refer us to similar cases adjudicated by the Board. However, the case of *United Steelworkers, Local 4487 v Inglis Limited* [1977] OLRB Rep. March 128 does offer some guidance where the Board at page 135 said:

“The Board has not previously dealt with alleged misrepresentation at the bargaining table. It is self-evident however, that misrepresentation which is the antithesis of good faith, destroys the rational basis upon which informed collective bargaining decisions are made ... Misrepresentation is alien to this process and is contrary to the duty set out in Section 14 of the Act.”

15. In our view the type of misrepresentation which comprises a contravention of Section 14 must involve an element of deceit designed to induce the other party to act to his detriment. The act of “taking a proposal off the table” destructive as it may be in specific cases of the credibility of a party to continuing constructive discussions is not per se a violation of the good faith requirement, in the absence of a misrepresentation deliberately made for an ulterior purpose.

16. In the instant case the complainant sought an assurance that a proposal which compared favorably with the Indalex settlement would gain the union committee’s recommendation of acceptance. That assurance was given in good faith by the union, and was followed by the union accepting a proposal put forth by the company, after two amendments proposed by the union, as meeting the test of favorable comparison and, therefore, a proposal which the union committee would recommend. It is clear to us that at the time the initial assurance was sought and given, that there could have been no doubt in the minds of either party but that the union would exercise its own judgment in determining whether the forthcoming proposal did in fact meet the standard of favorable comparison. In our experience, two parties can have widely varied interpretations of what is required to meet such a standard and, therefore, the company was not entitled to assume that mere agreement on the basis for judging the sufficiency of its proposal would result in the acceptance of that proposal.

17. In any event, the committee on November 29th agreed that the proposal as amended did, in its judgment, satisfy the agreed upon standard and they then confirmed that the proposal would be taken to a ratification meeting with their recommendation for acceptance.

18. The question then narrows down to whether the subsequent change in the committee’s judgment as to whether the proposal met the previously agreed standards amounts

to a breach of good faith. It is not without significance that the union's position which was the basis of the undertaking given the company of being prepared to recommend a settlement which compares favorably with that of Indalex was not changed by the membership meeting of December 3rd or in Rao's subsequent conversation with Blocha. In our view, it would have been better if, when Rao and his committee began having second thoughts about their judgment, they had returned to the bargaining table for more rational discussion rather than continuing on with the membership meeting.

19. It is our finding that in the total circumstances the respondents have not breached the statutory requirement to "bargain in good faith and make every reasonable effort to make a collective agreement", and the application is accordingly dismissed.

20. It now remains for the parties to return to the bargaining table and resume their discussions from the point where they were on November 29, 1978.

1568-78-R United Brotherhood of Carpenters and Joiners of America, (Applicant), v. **Intercraft Industries of Canada, Ltd.**, (Respondent), v. Group of Employees, (Objectors).

Certification – Membership Evidence – Irregularity in solicitation of membership support and collection of required fee resulting in representation vote

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members D. B. Archer and W. H. Wightman.

APPEARANCES: *T. G. Harkness and Walter Oliveira for the applicant; Joseph Liberman and Trevor Redmayne for the respondent; Linda Reid for the objectors.*

DECISION OF KEVIN M. BURKETT, VICE-CHAIRMAN AND BOARD MEMBER W. H. WIGHTMAN; January 11, 1979

1. The name "Intercraft Industries of Canada Limited" appearing in the style of cause of this application as the name of the respondent is amended to read: "Intercraft Industries of Canada, Ltd."

2. This is an application for certification.

3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.

4. Having regard to the agreement of the parties the Board further finds that all employees of the respondent in Mississauga, Ontario, save and except supervisors, persons above the rank of supervisor and office and sales staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

CLARITY NOTE: The timekeeper is an office employee excluded from the bargaining unit.

The industrial engineer is a person exercising managerial authority who is also excluded from the bargaining unit.

5. A question arose during the course of the hearing as to whether the person who signed Miss Chabot's card as having received the required \$1 payment did in fact receive the money directly from her. Miss Chabot testified that she returned the card to Mrs. Gloria May and later the same day paid the \$1 to her. She testified that no one else was present when the transaction took place. Mr. O. Zanin, a paid union organizer, signed Miss Chabot's card as having received the required \$1 from her. Mr. Zanin was called to testify and admitted under oath that he did not receive the \$1 from Miss Chabot. He received Miss Chabot's card and her \$1 payment from Mrs. Gloria May. He in turn signed the card as having received the \$1 directly from her and answered in the affirmative when asked by Mr. T. Harkness, the union official who signed the Form 8, if he had received the \$1 from the individual signing the card. Mr. Zanin, who signed as the collector on 14 cards, advised Mr. Harkness that he had received the \$1 from each of the individuals applying for membership with one exception. The exception, which is noted on the Form 8, is not Miss Chabot.

6. The certification process has been designed to protect the secrecy of the employee's selection and at the same time to minimize disruption of the employer's operation. The Board relies on the documentary evidence submitted by the trade union and does not call before it each and every employee in the bargaining unit for purpose of hearing oral testimony as to their true wishes. The Board relies on documentary hear-say evidence and must, therefore, be circumspect in its acceptance of this evidence if it is to protect the integrity of the certification process and thereby facilitate the bargaining process which follows the issuance of a Board certificate.

7. In this case Mr. Zanin, a paid union organizer, signed as collector when in fact he did not collect the \$1 payment from Miss Chabot. He did not advise Mr. Harkness of this fact although asked if he had collected \$1 from each of the individuals applying for membership. While it is clear on the evidence that Miss Chabot made the \$1 payment, we must find that Mr. Zanin's decision to sign as collector when he had not personally collected the \$1 payment, and his failure to advise Mr. Harkness when inquiries were made of him, casts a shadow over the cards signed by Mr. Zanin as collector. In the circumstances, the Board is not able to rely on these membership documents.

8. We are satisfied that Mr. Harkness made the inquiries necessary of the person signing the Form 8 and further, that the remaining membership documents submitted by the union meet the strict standards demanded by the Board. In the result, we are satisfied on the basis of all the evidence before it that not less than forty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on December 22, 1978, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

9. A representation vote will be taken of the employees of the respondent in the bar-

gaining unit. All employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

10. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

11. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER D. B. ARCHER:

1. I dissent from the decision of the majority. The facts are simple and uncontradicted. An employee named Miss Chabot, by her own admission, signed a card and paid one dollar. She paid it to another employee named Gloria May who then turned it over to a union official, Mr. Zanin. Mr. Zanin is an employee of another carpenters' local.

2. On the stand Mr. Zanin readily admitted that the facts are as stated. He collected 14 cards and swore he collected money and witnessed the signatures of all 14 except one which was shown in the Form 8.

3. The object of having a witness is to make sure someone can be questioned if doubt arises as to whether a card is fraudulent where a claim is made that the dollar has not been paid.

4. There is no question in the present instance that the signature is genuine and the dollar has been paid. No scheme or plan to defraud the Board is evident. I would have, without hesitancy, certified the union under these circumstances.

1319-78-R International Woodworkers of America, (Applicant), v. **Malette Wood Products Ltd.**, (Respondent), v. Lumber and Sawmill Workers' Union, Local 2995, (Intervener).

Prehearing Vote – Practice & Procedure – Unintentional breach of silent period by intervenor coming to attention of applicant when unable to make immediate adjustments and when further investigation warranted – Applicant not precluded from raising matter – New vote ordered

BEFORE: E. Norris Davis, Vice-Chairman, and Board Members C. G. Bourne and M. J. Fenwick.

APPEARANCES: *H. Goldblatt, J. C. Horan and P. J. Dupont for the applicant; R. D. Perkins and Danny Ryan for the respondent; Yvon DesRoches for the intervener.*

DECISION OF THE BOARD; January 24, 1979

1. The name: "NOD (A Subsidiary of Malette Lumber Inc.)" appearing in the style

of cause of this application as the name of the respondent is amended to read: "Malette Wood Products Ltd."

2. A pre-hearing vote was conducted December 7th and 8th, 1978, in this matter and the Registrar established the "silent period" to commence at midnight December 3, 1978. On December 15, 1978 the applicant filed objections to the conduct of the vote based on an alleged violation of the silent period by Lumber and Sawmill Workers' Union, Local 2995 on December 6, 1978 through distribution of material to employees at the plant gates.

3. Lumber and Sawmill Workers' Union, Local 2995 was not, at the time of violation, a party to these proceedings but had been a predecessor bargaining agent for the unit affected until its rights were terminated following a representation vote and was, in the period surrounding the vote, maintaining its employee contacts for the future.

4. Lumber and Sawmill Workers' Union, Local 2995 appeared at the hearing in respect to the applicant's complaint and by order of the Board was added as a party to the proceedings and the style of cause is amended accordingly.

5. The evidence is not in dispute that representatives of the Sawmill Workers appeared at the plant gates around 7:30 a.m. on December 6th which was the time of a shift change. It is frankly admitted that the material distributed by the Sawmill Workers was intended by them to dissuade employees from supporting the applicant in a vote, although the intervener denied knowledge that polling was to be conducted the following day or that the activity fell within the 72 hour period.

6. The President of Local 2995, Yvon DesRoches, who is a full-time officer of the union and located in Kapuskasing, Ontario, testified that his union had learned of the applicant's organizing activities in November and increased their plant contact. A meeting of employees in this unit was called by Local 2995 some time in November but no employees attended. DesRoches testified that his union became aware of the applicant's application as a result of the Notice to Employees posted on November 13th.

7. It was as a result of the meeting between the Local 2995 New Liskeard representative and DesRoches on December 4th that a decision was taken to go to New Liskeard and distribute a letter to employees. This decision was implemented on December 6, 1978.

8. Serge Lauzon, a night shift employee of the respondent was given a copy of the Local 2995 material as he came off shift about 8:00 a.m., December 6th. Lauzon informed the two persons passing out handbills (one of whom was DesRoches) that the vote was being held the following day and enquired whether the material might affect the vote and received a response to the effect, "I don't know but we're not in the ballot anyway". DesRoches testified that this was the first knowledge he had of the vote being conducted and that they then immediately ceased the distribution of the material. It appears that the material was distributed to no less than 12-13 employees and perhaps more. DesRoches also stated that in early December he had enquired of a company executive (at head office) as to the date of the vote and was unable to get the information; also, that on the night of December 6th he received a telephone call from their in-plant contact advising that the vote would be held next day, which information he acknowledged by saying "thanks very much but we have already found out the hard way".

9. The Board has no difficulty in concluding that Local 2995, Lumber and Sawmill Workers' Union, while not on December 6, 1978 a formal party to the proceedings, was nonetheless an "interested person" falling within the ambit of the Registrar's direction to "refrain and desist from propaganda and electioneering from midnight of December 13, 1978". Local 2995 pleads no actual knowledge of the date set for polling and the Board accepts that statement at face value. Nonetheless Local 2995 was, in fact, aware of the posting of the Notice to Employees on November 13, 1978 and should be reasonably considered to be on notice to take steps which would insure no interference with Board procedures which they, as experienced union representatives, were well aware would result in a vote being conducted in or around this period.

10. The Board therefore finds that there was a violation of the Registrar's direction in respect to refraining from electioneering.

11. Counsel for the respondent argues that while there was clearly a breach of the Registrar's direction, that the breach came to the attention of the applicant on the morning of December 7th and that failure of the applicant to immediately make objection rather than awaiting the results of the polls and thereby getting "two bites at the cherry" should cause the Board to not entertain the complaint. Counsel argues that substantial prejudice is occasioned to the employer through wage payments for lost time, interference with production, and involvement of executive time in the event a new vote should be ordered.

12. Mr. P. J. Dupont, regional organizer for the applicant acted as a scrutineer during the polling. Dupont arrived in New Liskeard from Bracebridge on the evening of December 6th and had no contact with any plant employee prior to his attending at the plant at 7.00 a.m., December 7th. The polls then remained open till 9.00 a.m. during which time, according to Dupont about two-thirds of the employees cast their ballots. On returning to his hotel about 9.30 a.m. he was handed an envelope by the desk clerk. The envelope was addressed "Mr. P. J. Dupont. I thought you would be interested". Inside the envelope was a copy of the material distributed by Local 2995 on December 6th. Dupont then went across the street to a restaurant and sat down with the Returning Officer and was shortly joined by the company Personnel Manager, Danny Ryan, who was also acting as a scrutineer. During that conversation, Ryan acknowledged that he had been informed by a foreman of the Local 2995 material and he and Dupont discussed specific parts of the Local 2995 material.

13. Ryan testified that, at that time, he enquired of the Returning Officer whether he would continue with the vote (a further poll was scheduled for 4.00 p.m. – 5.00 p.m. on December 7th and one at 7.30 p.m. – 8.30 p.m. on December 8th) or stop it. According to Ryan, the Returning Officer's response was "that was dependent on whether some one wanted to make an appeal". Dupont then said that he would wait until completion of the vote before deciding whether to make an objection. At the hearing Dupont explained his position as "I honestly thought we would win".

14. In any event the balloting went forward and just prior to the counting of the ballots, according to Dupont, Ryan asked the Returning Officer as to what could form the basis of an "appeal" and indicated he felt the two unions were probably in collusion on the letter as "unions generally stick together".

15. On the counting of the ballots, the applicant failed to receive more than 50 percent of the votes cast. On December 15th the instant complaint was filed.

16. In the *Chateau Gardens* case [1977] OLRB Rep. Jan. 12 the facts were that a person, who acted on behalf of the applicant union as a scrutineer, became aware at the onset of the silent period while removing the applicant's election material from the bulletin boards in the plant, that there remained posted election material of the incumbent union. This knowledge was not passed to any other representative of the applicant union and the vote was allowed to proceed. Shortly after the completion of the vote, counting of ballots and signing of certificate, a business agent of the applicant arrived at the premises and himself observed the offending material still posted. The following day the applicant filed objections to the conduct of the vote. The Board, in refusing to entertain the objections, stated in paragraphs 8 and 9:

"8. The Board finds that the CLAC was under a duty to exercise some dispatch in the filing of its charges once it became known that another party to the dispute was in breach of the Registrar's direction. The Board is of the view that the purpose of the imposition of the silent period is to prevent any one party from gaining an unfair advantage with respect to electioneering. If the circumstances described to the Board in the CLAC's evidence was true and had due diligence with respect to the wrongdoings been exercised then adjustments could have been made to correct the alleged shortcoming. In other words, it does not lie in the mouth of a party to exploit to its own advantage a rule that was designed to assure fairness in the conduct of the vote. We find that a party cannot 'lie in the bushes' and await the outcome of a vote and when it learns that the result was not amenable to its liking seek a second representation vote on the basis of a breach of a rule that could have been brought to the Board's attention in advance of the taking of the vote. (See: *R. Pure Spring (Canada) Ltd. et al* case, an unreported decision of The High Court per King J., dated February 21, 1965).

9. In the normal circumstances, had due diligence been exercised in the filing of the allegations the Board may very well have directed that the ballot box be sealed pending the disposition of the evidence filed in support of the charges. Or, the Board may very well have dispatched a Labour Relations Officer to investigate the respondent's premises and upon those findings the Board may very well have cancelled the holding of the vote and scheduled it for another day to permit the prejudiced party to recoup what lost advantage had accrued as a result of the impugned electioneering. Whatever the adjustments that could have been made prior to the holding of the vote we are satisfied that the CLAC's conduct in delaying the filing of the charges until after an unhappy result was known deprived the Board of any such opportunity. The Board is confident that our rules were not designed to allow a party in these circumstances to have 'two bites of the cherry' where one may have sufficed. As a result the Board is satisfied having regard to all of the evidence and the ensuing concerns with respect to continued viable collective bargaining that the CLAC ought to be foreclosed from filing its objections. (See: *Lecours Lumber Company Ltd.* case, [1972] OLRB Rep. November 982)."

17. In the case before us the evidence is that the unintended breach by Lumber and Sawmill came to the attention of the applicant anonymously. The material is undated and the anonymous source did not provide any information as to when or how it may have been distributed. At the time the applicant became aware of its existence the voting process was well in motion and at that time the applicant had no knowledge of the time or mode of distribution. The applicant immediately questioned the company's scrutineer and learned from him that he had been told that the material had been distributed at the gate the preceding day. The applicant then took no formal step to make objections until December 15th (one week after completion of balloting).

18. The instant case is to be distinguished from the *Chateau Gardens* case in that here the knowledge of a breach came to the applicant at a time when there was no longer an opportunity to make adjustments prior to the holding of the vote and under circumstances, in our opinion, which warranted the applicant making further investigations as to the substance of matters prior to making allegations of improper or irregular conduct.

19. Under all the circumstances of this case we believe the applicant did move with reasonable promptness to bring the matter to the attention of the Board.

20. The results of the vote held on December 7th and 8th, 1978 are set aside and a new vote is directed to be held.

21. The matter is referred to the Registrar.

0194-78-R Claude Leduc, (Applicant), v. Local Union 1687 of the International Brotherhood of Electrical Workers, (Respondent), v. **M. G. Burke Investments Ltd.**, (Intervener)

Termination – Effect of previous termination application which had been dismissed

BEFORE: Arthur L. Haladner, Vice-Chairman and Board Members J. D. Bell and W. F. Rutherford.

APPEARANCES: *Raimo T. Heikkila and Claude Leduc for the applicant; C. M. Mitchell and Lou Popovich for the respondent; no one for the intervener.*

DECISION OF THE BOARD; January 18, 1979

1. The applicant, Claude Leduc has applied to the Board under Section 49 of the Labour Relations Act for a declaration that the respondent no longer represents the employees in the bargaining unit for which it is the bargaining agent.

2. It should be noted at the outset that this is not the first application for termination filed with respect to the three employees affected. On December 31, 1977, Barry Polkinghorne, a signatory to the statement of desire (petition) which is presently before the

Board filed an application for termination in respect of the same group of employees – namely Polkinghorne, Leduc and R. Rousseau. That earlier application which was supported, as was the instant one, by a statement signed by Polkinghorne and Leduc was dismissed by the Board on the ground that the petition did not represent a voluntary expression of employee desires (See Board File No. 1569-77-R decision dated September 5, 1978).

3. The Board's decision records that the earlier petition, which was prepared following a discussion between Polkinghorne and Leduc, was preceded by two incidents in which D. McNab, the owner and president of the intervener suggested to employees that the union be removed, incidents which Polkinghorne was found to have been involved in, despite his testimony to the contrary. The Board's decision also records that on December 28th, the day prior to the discussion between Polkinghorne and Leduc, Louis Laverdiere, an employee who had been approached by Leduc in both November and December with the idea of getting rid of the union, was called in from vacation and informed by McNab, in the presence of Polkinghorne, that he was being laid off. In commenting upon the layoff, the Board noted that although work was slow, Laverdiere had been previously employed for six and a half years without layoff. Further, the Board stated "it is significant that the removal of Mr. Laverdiere from the bargaining unit would ensure the success of a representation vote resulting from the termination application by reducing the number of likely union supporters to less than fifty per cent."

4. The instant application for termination which was made by Leduc on April 27, 1978 was made prior to the first application being dismissed by the Board. In fact, the application was made prior to the completion of the Board's hearing – after Leduc the first witness for the applicant (in that proceeding Polkinghorne) had been cross-examined by counsel for the union. Leduc gave evidence that the petition in this case was prepared on April 25, 1978 – five days after the first day on which evidence was heard by the Board (the original application which was heard over several days came on for a hearing on January 30, 1978 but was adjourned so that proper notice could be given to all parties. Consideration of the instant application was postponed until a decision on the first had been rendered). Leduc testified that the petition was prepared because he knew the open period to be closing – at the end of April – and he "could see that things were not going well at the hearing".

5. Leduc testified that the idea for the petition was his and his alone and that he did not consult with Polkinghorne or anyone from management. He acknowledged, however, that he had taken the wording for the preamble from the first petition which he claimed to have "borrowed" from Polkinghorne. It should be noted here that Leduc is Polkinghorne's apprentice – Polkinghorne is a working foreman – and that Leduc takes direction from Polkinghorne at work. Leduc testified that he has incurred the legal expenses of this proceeding i.e. counsel's fee, on his own behalf and that he will be receiving no contribution from Polkinghorne, the person who made and, together with Leduc, organized the original application for termination. Nor, he testified, has he received any encouragement from Polkinghorne.

6. The Board places an evidentiary burden upon those who seek to rely upon a petition in support of an application for termination to come forward with credible and convincing evidence which satisfies the Board, on the balance of probabilities, that the petition represents a voluntary expression of the true wishes of the employees who signed it, free from the influence of management. Where the evidence discloses that there has been inter-

ference by the employer in the circumstances surrounding the origination preparation or circulation of the petition, or that the actions of management have served to create a "climate" which thwarted voluntary expression, the petition will be rejected by the Board on the ground that it does not represent a voluntary expression of employee wishes. The Board's approach to petitions is based on a frank recognition of employee dependence on the employer especially for job security and the opportunity this gives the employer for undue influence on the freedom which the Act guarantees to employees to select or reject a trade union as bargaining agent.

7. On the evidence before it, the Board is not satisfied that the petition filed in this proceeding represents a voluntary expression of employee desires. Even if the Board were to accept Leduc's evidence that he acted on his own and without encouragement from management or Polkinghorne (evidence which strikes the Board, at least in the latter case, as less than convincing – in light of Polkinghorne's relationship to Leduc and his involvement in the first proceeding and the incidents preceding) we have concluded that the employer's involvement – an involvement which caused the Board to reject the earlier statement – was such that the second petition ought also to be rejected.

8. The Board, it should be made clear, is not saying that employer involvement in a previous termination application must forever taint the efforts of employees who decide later to make a subsequent one. There comes a point beyond which the influence of the employer will, in the absence of further involvement, be taken to have been dissipated. Where, however, as here, the second application is made within a few months of the first, and where, as here, it is made before the first is disposed of by an employee who has been involved in the earlier proceeding both as an originator and a witness, the Board will not lightly conclude that the employer's involvement is of no further effect.

9. Our conclusion, after considering the evidence before us, is that as of April 27, 1978 – the day of application – the influence of the employer remained. We find that if the petition was not inspired directly by management, it arose in a climate which made voluntary expression unlikely.

10. For the reasons stated, the Board finds that the petition filed in support of this application for termination is not a voluntary expression of the wishes of the employees who signed it. Accordingly, this application for termination of bargaining rights is dismissed.

0998-78-M The Association of Allied Health Professionals: Ontario, (Applicant), v. **Ottawa Crippled Children's Treatment Centre**, (Respondent).

Employee – Whether subject employee exercises managerial functions

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members J. D. Bell and O. Hodges.

DECISION OF KEVIN M. BURKETT, VICE-CHAIRMAN AND BOARD MEMBER J. D. BELL; January 31, 1979

1. This is an application under section 95(2) of The Labour Relations Act. The Board in a decision dated September 26, 1978 appointed an Examiner to meet with the parties and inquire into the duties and responsibilities of the person classified as Assistant to the Director of Physiotherapy. The Board is in receipt of the report of the Examiner and the written submissions of the parties in this matter. The parties advised the Board that a formal hearing in this matter would not be necessary.

2. Section 1(3)(b) of the Act reads:

"1(3) Subject to section 80, for the purposes of this Act, no person shall be deemed to be an employee,

(b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations."

The purpose of the section is to maintain the necessary arm's length relationship between those who, in the opinion of the Board, exercise managerial authority or are employed in a confidential capacity in matters related to labour relations and those who do not. Collective bargaining is recognized as an adversary process and hence the section is designed to prevent persons whose sole allegiance should rest with the employer from being cast into a conflict of interest by virtue of their possible inclusion within a bargaining unit of other employees. The Act does not define the terms "managerial functions" or "confidential capacity in matters relating to labour relations" but provides the Board with a broad discretion to apply the section having regard to the particular work setting under consideration.

3. The physiotherapists employed by the Ottawa Crippled Children's Treatment Centre are assigned to work in the Treatment Centre itself, which treats out-patients, or in the children's hospital which "contracts" the services of the physiotherapists to treat patients in the hospital. There is no interchange between the two groups. Gail Bowes, the Assistant Director of Physiotherapy works in the hospital. She spends 60-70 per cent of her time doing treatment work. She testified that the physiotherapists who work in the hospital "are under my direction and control with the assistance of Diane Caulfeild" (the Director of Physiotherapy). She has supervisory authority over the physiotherapists in the centre when the director is away. She testified that she looks at the written work and when possible watches treatments given by the physiotherapists in the hospital. She testified that she has spoken to individuals about the quality of their work on her own initiative but has informed Diane Caulfeild of what she was doing. She, along with Diane Caulfeild, determine which job applicants should be interviewed and she takes part in the employment interview with Diane Caulfeild, the director. She evaluates probationary employees "in conjunction with Diane Caulfeild", takes part in the assessment interview and signs the assessment form. Authority in respect of the granting of time-off, leaves of absence and vacation scheduling rests with the director. Ms. Bowes, however, has called in part-time physiotherapists as required. Ms. Bowes has never had to discipline or discharge an employee nor has she been required to recommend an employee for promotion or transfer in the 13 months she has held the Assistant Director's position. She was told at the time she took the position, however, that she had authority to make recommendations in regard to these matters. She has not sat in on grievance meetings although the director has discussed with her the union's bargaining proposals.

4. The Board has reviewed the evidence and is satisfied that Ms. Bowes exercises managerial authority within the context of the respondent's organization. The Board is satisfied, having regard to her supervisory responsibility over the physiotherapists who work in the Hospital (as distinct from those working in the Treatment Centre), and to her involvement in the hiring process and in the evaluation of probationary employees that she exercises managerial authority within the meaning of section 1(3)(b) of the Act. Although Ms. Bowes works closely with Ms. Caulfield in all matters, the Board is satisfied that she is the arm of management in respect of the physiotherapists working in the Hospital and would find herself in a conflict of interest if included in a bargaining unit with them.

5. Having regard to all of the foregoing, the Board hereby declares that Gail Bowes is not an employee within the meaning of the Act.

DECISION OF BOARD MEMBER O. HODGES:

1. I dissent.

2. The physiotherapy department at the Crippled Children's treatment Centre treats out-patients within the Centre itself and pursuant to a contractual agreement, in-patients at the Ottawa Children's Hospital. While the two facilities are connected physically they are operated as separate and distinct clinical areas. Physiotherapists employed by the department are employed in one or the other of the areas and there is no interchange of staff between areas. The department's office is located in the Centre itself and the department's Director is responsible for the operation of both areas. Although Ms. Bowes is classified by the respondent as the Assistant Director of the department, her duties and responsibilities are limited exclusively to the respondent's operations within the hospital.

3. Ms. Bowes spends 60 to 70 per cent of her working time performing clinical work. She has limited input into the scheduling of work and the allocation of caseloads – work is generally scheduled on a rotational basis and caseloads are allocated by group decisions of the staff. Although nominally responsible for the supervision of the other physiotherapists employed in the hospital, because of the professional nature of the work performed, such supervision is normally restricted to ensuring compliance with predetermined standards concerning the written reports of patient treatments. She testified that when she was hired, she was informed by the respondent that she had authority to recommend discipline or discharge, yet in the thirteen months which she has held the position, she has recommended neither. She has no authority over vacation scheduling or the allocation of overtime. While she has authority to grant time off to the other physiotherapists in order that they might take advantage of educational opportunities, she has no authority to decide whether an employee taking educational leave will be paid during the period of the leave. Ms. Bowes regularly assesses the work performance of probationary employees and along with the department's Director participates in assessment interviews. However, she has never held an assessment interview by herself. Likewise, although she participates with the Director in assessing job applications and in conducting job interviews, such authority is always exercised in conjunction with the department's Director, and is restricted to applicants seeking employment in the Centre's hospital operations.

4. It is my opinion that Ms. Bowes' functions can be analogized to those of a lead hand in an industrial setting. Her functions and the exercise of those functions suggest con-

sultative rather than recommendatory powers. Given the physical characteristics of the respondent's operations, Ms. Bowes serves more as a line of communication than as an actual manager of its operation.

5. While I agree that the underlying purpose of section 1(3)(b) of the Act is to foster and maintain an arm's length relationship between the two parties to the collective bargaining process, I have some doubts as to whether that purpose necessitates a watertight demarcation between labour and management. Moreover, given the nature of management organization in many service related industries, and in particular those industries which rely heavily and often almost exclusively on professionally skilled employees, attempts at stark line drawing between management and labour smack of arbitrariness. It is my view that the right to bargain collectively ought not to be denied to a person unless that person's job duties manifest a serious potential for conflict in the bargaining objectives of the parties. To include Ms. Bowes in the bargaining unit, in my opinion, would not generate such a conflict.

6. On the basis of all of the foregoing considerations, I would have found Ms. Bowes an employee for purposes of the Act.

1065-78-R United Brotherhood of Carpenters and Joiners of America, Local 3054, (Applicant), v. The Toronto-Dominion Bank and Price-Waterhouse Limited, (Respondents).

Sale of a business – Successor Status – Receiver-Manager assuming control of employer pursuant to debenture – No disposition or sale of business – Receiver held not to be successor although company remained bound by collective agreement

BEFORE: Arthur L. Haladner, Vice-Chairman and Board Members H. J. F. Ade and P. J. O'Keeffe.

APPEARANCES: *J. Melnitzer and Adam Salvona for the applicant; T. David Little for the respondent.*

DECISION OF THE BOARD; January 8, 1979

1. This is an application under Section 55 of The Labour Relations Act alleging a sale of a business by Cassin-Remco (the company) to Price-Waterhouse (the receiver) and/or The Toronto-Dominion Bank (the Bank). The applicant is seeking a declaration that one or both of the respondents are bound by the collective agreement between itself and the company effective May 19, 1976 to December 31, 1978.

2. At the hearing, the parties were agreed upon the following facts:

(1) On August 29, 1977, the company executed a debenture in favour of the Bank to secure repayment of the sum of \$750,000.00. The debenture

was registered pursuant to the Corporations Securities Registration Act on September 8, 1977.

(2) Because of default by the company on its obligations pursuant to the debenture, the Bank, pursuant to the terms of the debenture appointed Price-Waterhouse Limited as receiver and manager of the assets and undertaking of the company.

(3) Thereupon Price-Waterhouse went into possession of the assets and undertaking with a view to liquidation of same for the purpose of satisfying the indebtedness of the company to the Bank.

3. Since July 21, 1978 Price-Waterhouse has acted in its capacity as receiver and manager pursuant to the debenture and has at all times been acting with a view to the liquidation of the assets by one means or another to satisfy the company's indebtedness.

4. Price-Waterhouse has continued to carry on a business of a substantially similar character in a substantially similar manner at the premises of the company. The work performed subsequent to the receivership is not substantially different from the work performed prior thereto.

5. Price-Waterhouse has continued to check off union dues and pay employees' wages pursuant to the collective agreement.

6. This is the first proceeding in which the Board has been called upon to determine whether a receiver is a successor employer. In previous proceedings involving a receiver, the application was brought by the trade union after the employer had disposed of the business (assets) to a third party; and it was against the third party that the declaration of successorship was sought. In the instant case, the applicant has not waited for the receiver to dispose of the company's business (assets) to a third party. Instead, it has sought a declaration that the receiver or in the alternative the person appointing it i.e. the Bank is a successor employer.

7. The Board considers that this application has been prematurely brought. In order for a sale of a business within the meaning of Section 55 to occur, it is necessary that there be a disposition from, in this case, the employer that is party to the collective agreement to another person. An examination of the relationship existing between the company and the respondents reveals that this has not yet occurred. What has happened is that a receiver has been appointed to manage the business – so that the Bank which holds a first charge on the assets and undertaking may enforce its security. Although the receiver is carrying on the business for the benefit of the Bank to which it owes a fiduciary duty, its actions are those of the company which retains the legal and equitable ownership of the assets. Under the terms of the debenture constituting the receiver as the agent of the company, the company is "solely responsible for the receiver's acts or defaults and for its remuneration and expenses". In these circumstances, it cannot be said that a disposition within the meaning of Section 55 has occurred.

8. It should be emphasized that the result of our decision is not that the bargaining rights of the applicant have been lost which was the result in all previous proceedings in

which a Section 55 declaration was refused by the Board. As was recognized by counsel for the respondents, the company's obligations both under the Act and the collective agreement were not extinguished by the appointment of the receiver. So long as the business continues to function, those obligations persist. For that reason, the receiver has continued on behalf of the company to honour the collective agreement.

9. It follows from the foregoing that the applicant may file grievances in respect of any differences arising from the interpretation, administration, or alleged violation of the agreement and that it may seek enforcement of arbitration decisions in the manner prescribed by the Act. At the hearing the Board was informed that certain obligations incurred by the company prior to the commencement of the receivership had not been discharged. The Board recognizes that the assets of the company may be insufficient to satisfy these obligations. But that eventuality, should it occur, is attributable solely to the financial difficulties which have afflicted the company, difficulties which have prejudiced the position of the company's creditors as well as the employees. We would add that had the Bank elected not to operate the business as a going concern but to dispose of the assets on a piecemeal basis after closing down, the employees would be left to their traditional remedies. In addition, the employees would be without work.

10. The Board finds that there has not been a sale of the business of Cassin-Remco to either Price-Waterhouse or The Toronto-Dominion Bank and that the business remains, at least for the present, in the hands of the company. The application is therefore dismissed. The dismissal is of course without prejudice to the applicant's right to file a new application should the receiver dispose of the business (assets) to a third party.

0764-78-R Ontario Nurses' Association, (Applicant), v. Peel Manor Home for the Aged, Regional Municipality of Peel, (Respondent).

Certification – Employee – Employee exercising a degree of independent decision making authority but insufficient for finding of managerial

BEFORE: Ian C. A. Springate, Vice-Chairman and Board Members O. Hodges and E. C. Went.

APPEARANCES: *Victor Solomatenko for the applicant; Donald E. Houck, Stanley G. Craig and Peter H. Graham for the respondent.*

DECISION OF THE BOARD; January 15, 1979

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.
3. The applicant has requested that it be certified to represent certain registered and

graduate nurses in the employ of the respondent. The position of the respondent, however, is that all of the nurses affected by this application exercise managerial functions and thus are excluded from collective bargaining by section 1(3)(b) of the Act.

4. On August 10, 1978 the Board appointed an Examiner to inquire into the list and composition of the bargaining unit. At a meeting with the Examiner the parties agreed that the evidence of Mrs. Janet Armstrong, R.N., concerning her duties and responsibilities would be representative of all of the nurses affected by the application except for Mrs. Judy Mayer, the staff assistant to the Director of Nursing. Mrs. Mayer was examined separately. The respondent also called Mr. Stanley G. Craig, the director of personnel for the Regional Municipality of Peel, as a witness before the Examiner.

5. Initially the respondent took the position that Mrs. Mayer should be dealt with separately from the other nurses. However, at the hearing held on December 4, 1978 to hear the representations of the parties with respect to the Examiner's report, the respondent's representative indicated that the position of staff assistant to the Director of Nursing had been eliminated and that accordingly the respondent was withdrawing its request that Mrs. Mayer be dealt with separately.

6. Mrs. Armstrong stated that she works on the day shift and is responsible for supervising some 6 to 8 other employees, namely a single orderly and a number of health care aides. The orderly and health care aides perform a variety of fairly simple tasks including bathing residents, rubbing their backs and soaking their feet. Mrs. Armstrong on the other hand performs tasks requiring greater nursing skill such as giving eye treatments, dispensing prescription drugs, and doing rounds with doctors. Mrs. Armstrong indicated that she ensures that the aides and orderly perform their tasks correctly and that the needs of the home's residents are being taken care of. She also indicated that if anything out of the ordinary occurs the aides raise it with her "and then we discuss it and decide what's to be done."

7. Mrs. Armstrong plays no role at all in the hiring of staff. She has never recommended in writing that an employee be discharged although she did suggest to the Director of Nursing that a specific employee be discharged. The employee involved, however, is still employed by the respondent.

8. Mrs. Armstrong indicated that she could give verbal warnings to employees but not any discipline beyond that. She explained her role as follows: "You may speak to someone that they're doing something wrong or they should do this or that, but I have no authority to really do anything concrete." With respect to the employee that she felt should be discharged Mrs. Armstrong indicated that on one occasion she found him asleep on the job and as a result gave him a verbal warning and filed a written report about the incident with the Director of Nursing. Later she had occasion to file another report about the same employee with the Director of Nursing but did not discuss the matter with the employee. As already noted, Mrs. Armstrong's suggestion that the employee be discharged was not acted on. In February of 1978 the Director of Nursing requested that nurses give her in writing any concerns they might have about employees' poor work performance. However, there is nothing to indicate that the nurses were also asked to give their recommendations about any possible disciplinary action. From these facts, one is led to the conclusion that while the nursing staff can verbally warn employees their only function with respect to more serious discipline is to provide the Director of Nursing with information so that she can decide whether or not more serious discipline is warranted.

9. Some two years ago Mr. S. Craig, the Director of Personnel for Peel Region, attended at the home to give a talk to the nursing staff. While neither Mr. Craig nor Mrs. Armstrong could remember the specifics of what was said at the time, Mr. Craig indicated that he could recall discussing the topics of absenteeism, insubordination and how to take disciplinary action. However, notwithstanding this talk all indications are that Mrs. Armstrong's actual authority to discipline remained limited to the giving of verbal warnings.

10. Mrs. Armstrong does not do evaluations on any employees, even those whose probationary period is about to come to an end. When new aides are rotated through her area as part of their orientation she is required to tick off on a form those matters that she has covered with them, such as bed-making and taking temperatures. She does not, however, give an appraisal as to how well each new employee has done on a particular task.

11. During the week Mrs. Armstrong has no independent authority to grant time off. In the past when asked by an aide for permission to leave work early Mrs. Armstrong has consulted with either the Director of Nursing or her assistant. On weekends, however, (and one would suspect this would always be the case for the evening and night staff) since the Director and her assistant were not readily available Mrs. Armstrong has on her own initiative allowed employees to leave work up to an hour early for personal reasons. She has also permitted employees to leave part way through a shift if they complained that they were not feeling well.

12. When a shift is short-handed Mrs. Armstrong on her own initiative has asked employees from the earlier shift to work an additional two or three hours. However, if someone must be called in for an entire shift because of a staff shortage the decision to do so has always been left to the Director of Nursing or her assistant. When people are called in it is done by an order of seniority. Generally it is not Mrs. Armstrong who has telephoned staff asking them to come in, but when she has and they have refused she has simply recorded this fact and gone on to telephone someone else.

13. The aides and orderlies are in a bargaining unit represented by the Canadian Union of Public Employees. Some two or three years ago when the first collective agreement was signed covering these employees Mr. Craig came to the home and explained it to the nurses. Since that time Mrs. Armstrong seems to have had no involvement with the agreement. She also does not attend any meetings where labour relations matters are discussed.

14. The question of whether a person, or group of persons, exercises managerial functions is very much a question of fact to be determined in the circumstances of each particular case. This is highlighted by a comparison of the Board decisions in the *Oakwood Park Lodge* (File No. 0643-77-R) and the *Belvedere Heights Home for the Aged* (File No. 0180-78-R) cases. The *Oakwood* case involved a nursing home where the Board concluded that all of its registered nurses were employed in a managerial capacity. In the *Belvedere* case the facts involved were somewhat different and the Board concluded that nursing staff below the rank of Director of Nursing did not exercise managerial functions.

15. In the instant case it is clear that the nurses do supervise the aides and orderlies. However, this supervision is largely carried out in their professional capacity as nurses and not as members of management. The nurses have no general power to hire or fire employees or to discipline them beyond verbal warnings. Further it appears not to be part of their re-

sponsibility to recommend disciplinary action and in the one instance we were informed of where such a recommendation was volunteered it was not accepted.

16. A certain degree of independent decision-making rests with the nurses in their ability to request other employees to stay for a couple of hours at the end of their regular shifts and, when more senior staff is not readily available, to on their own initiative allow employees to leave work early. This limited authority standing by itself, however, does not give to the nursing staff the ability to materially affect the employment relationships of others, which in our view is the distinguishing characteristic of a supervisor who exercises managerial functions. (See: *McIntyre Porcupine Mines Ltd.*, [1975] OLRB Rep. Apr. 261.)

17. Having regard to the above, it is our opinion that registered and graduate nurses in the employ of the respondent, exclusive of the Director of Nursing, do not exercise managerial functions and therefore are not excluded from collective bargaining by the operation of section 1(3)(b) of the Act.

18. The Board accordingly finds that all registered and graduate nurses employed in a nursing capacity at Peel Manor Home for the Aged, Regional Municipality of Peel, Brampton, save and except for the Director of Nursing, those above the rank of Director of Nursing and those persons regularly employed for not more than twenty-four hours per week constitute a unit of employees of the respondent appropriate for collective bargaining. This unit is hereinafter referred to as "bargaining unit #1."

19. The Board is satisfied on the basis of the evidence before it that more than fifty-five per cent of the employees in bargaining unit #1, at the time the application was made, were members of the applicant on 1st August, 1978, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

20. A certificate will issue to the applicant with respect to bargaining unit #1.

21. The Board further finds that all registered and graduate nurses regularly employed for not more than twenty-four hours per week in a nursing capacity at Peel Manor Home for the Aged, Regional Municipality of Peel, Brampton, save and except for the Director of Nursing, and those above the rank of Director of Nursing, constitute a unit of employees of the respondent appropriate for collective bargaining. This unit is hereinafter referred to as "bargaining unit #2."

22. The Board is satisfied on the basis of the evidence before it that more than fifty-five per cent of the employees of the respondent in bargaining unit #2, at the time the application was made, were members of the applicant on 1st August, 1978, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

23. A certificate will issue to the applicant with respect to bargaining unit #2.

1478-78-U Ontario Nurses' Association, (Complainant), v. Scarborough Centenary Hospital Association, (Respondent).

S-79 – Withdrawal of free parking privileges held to be a breach of statutory freeze of terms conditions and privileges of employment while parties are renegotiating agreement.

BEFORE: G.

Gail Brent, Vice-Chairman and Board Members J. D. Bell and W. F. Rutherford.

APPEARANCES: *Victor Solomatenko and Maureen O'Halloran for the complainant; Murray Levis for the respondent.*

DECISION OF THE BOARD; January 10, 1979

1. The complainant has complained that the respondent has dealt with the members of the bargaining unit represented by the complainant contrary to the provisions of section 70 of the Act as modified by section 10 of the *The Hospital Labour Disputes Arbitration Act* R.S.O. 1970, c. 208 as amended.
2. The parties agreed on the facts which were relevant to the disposition of this matter. Free parking has been a privilege extended to the employees of the respondent since 1967. On or about May 4, 1978 the respondent posted a notice to employees that it would commence charging for parking commencing June 1, 1978. By a decision of this Board dated July 18, 1978 (*Canadian Union of Public Employees v. Scarborough Centenary Hospital Association*, [1978] OLRB Rep. July, 679) that change in the practice regarding free parking was found to be in violation of the statutory freeze period.
3. At the time of the Board decision in July the parties were in the process of resolving their bargaining differences through the process of interest arbitration as provided for in *The Hospital Labour Disputes Arbitration Act*. An arbitration award dated September 28, 1978 was issued to the parties. This award pertained to a collective agreement which expired on September 30, 1978.
4. During the course of the hearings which preceded the interest award, both of the parties made representation to the Board of Arbitration concerning parking charges. Despite this, the interest award was silent on the subject of parking charges and, as a consequence, the collective agreement which expired September 30, 1978 did not contain any provision concerning parking.
5. The complainant gave the respondent notice to bargain dated September 27, 1978. On October 23, 1978 the respondent notified the employees represented by the complainant that it would begin charging for parking after October 31, 1978. The text of this notice is reproduced below:

“Monthly Charge for Parking

In May of this year the Hospital advised all Staff that commencing June 1st, a charge would be made for parking.

A section of the Ontario Labour Relations Act provides a ‘freeze peri-

od' of salary, benefits etc., in order to establish a base for collective bargaining. This 'freeze period' coincided with the date proposed to commence pay parking, thus the charges for parking for members of this bargaining unit had to be deferred. The \$5.00 deposit for the card is not considered a charge because it is refundable.

The 'freeze period' ended September 28, 1978, the date on which the Arbitrator Mr. Kevin Burkett issued his Award.

This is to confirm that charges for parking will commence in November for those with cards in their possession after October 31st."

6. There is apparently no dispute between the parties that the notice of October 23, 1978 and the commencement of charges after October 31, 1978 fell within the freeze period which commenced after the giving of notice to bargain and the expiration of the collective agreement in September, 1978. The sole issue in dispute is whether the respondent could, under the circumstances, charge for parking after October 31, 1978.

7. In support of its position the respondent argued that revocation of free parking privileges was communicated to the complainant and the employees it represents in May, 1978, prior to the freeze now in effect. It further argued that the decision to revoke free parking privileges was an announced pre-determined scheme which took effect in the freeze period and therefore should not be considered as a violation of the statutory freeze period.

8. In the instant case, the respondent's argument rests on its ability to rely on the May 1978 notice as announcing its decision to revoke free parking privileges. It is the decision of the Board that the May, 1978 notice cannot be so relied upon under the circumstances. After that notice was posted, the parties made the question of parking fees a bargaining issue by including it as an item in dispute before the arbitration board. The reasonable expectations of the parties would be that this matter would be dealt with and resolved by the interest award. It is therefore our decision that the intervening action of treating the question of parking charges as a matter for resolution by the arbitration board had the result of determining the effectiveness of the May notice. As a result, the situation after the release of the interest award must be considered just as if no notice was given in May, 1978.

9. In view of this conclusion, the matter before us is identical to the situation which the Board considered in its award of July 18, 1978. Therefore, the Board concludes that the respondent neither exercised its right to revoke the privilege outside the freeze period, nor did it communicate its intention to do so prior to the freeze period. As a consequence, the respondent must be taken to have violated the provisions of section 70 of the Act as modified by section 10 of *The Hospital Labour Disputes Arbitration Act*.

10. For all the above reasons, the Board orders that the respondent reinstate the privilege of free parking which was extended to the members of the bargaining unit represented by the complainant and that the respondent reimburse the members of said bargaining unit for all parking charges collected in violation of the freeze period. The Board will remain seized of the matter for purposes of assessing the amount to be returned to the employees in the event that the parties are unable to agree on this matter.

0742-78-U 0854-78-U The United Brotherhood of Carpenters and Joiners of America, (Complainant), v. **M. Sullivan and Son Limited**, (Respondent).

S-79 – Practice & Procedure – Previous complaint dismissed following nonappearance of complainant – Board refusing to entertain new complaint.

BEFORE: Ian C. A. Springate, Vice-Chairman and Board Members J. D. Bell and O. Hodges.

APPEARANCES: *H. P. Rolph and Tom Cope for the complainant; A. P. Tarasuk and S. Johnson for the respondent.*

DECISION OF THE BOARD; January 9, 1978

1. These are two complaints filed pursuant to section 79 of The Labour Relations Act. The respondent is an employer in the construction industry. File 0742-78-U alleges that the respondent laid off three named grievors contrary to section 58(a) of the Act. File 0854-78-U makes the same claim with respect to a fourth grievor. The complainant has indicated that it was only due to its inadvertence that all four grievors were not named in File No. 0742-78-U.

2. The respondent objects to the Board entertaining these two complaints on the grounds that the same issues were raised in an earlier complaint in File No. 0582-78-U between the same parties and involving the same four grievors. The complainant acknowledges that the two new complaints when taken together are almost identical to its original complaint.

3. The original complaint in File No. 0582-78-U was filed on June 23, 1978. On June 28, 1978 the Board set July 18, 1978 as the date for the hearing into the matter. At the time set for the hearing representatives of the respondent were in attendance, but no one appeared on behalf of the complainant. On July 19, 1978 the Board issued a decision which disposed of the complaint in the following terms:

“The complainant failed to appear at the hearing and the Board therefore dismisses the complaint.”

4. The instant complaints were filed on July 19 and August 10, 1978. As already noted they are virtually identical to the original complaint.

5. At the hearing scheduled in these proceedings counsel for the respondent took the position that the dismissal of the original complaint made the subject matter of that complaint *res judicata* and that accordingly the Board should not inquire into the new complaints. It was counsel's further submission that if the complainant desired to re-open the subject matter of the original complaint it should do so by way of a request to the Board to reconsider its decision dismissing the complaint. Counsel for the complainant did not agree with these submissions. It was his contention that the complainant was not limited to seeking a reconsideration of the decision dismissing the original complaint and further that the earlier dismissal should not act as a bar to the Board entertaining the new complaints.

6. We would state at the outset that we do not agree that the principle of *res judicata* applies to bar the Board from entertaining the instant complaints. It is a necessary precondition to the application of the principle of *res judicata* that an earlier proceeding have resulted in a judgment on the merits, which certainly was not the case with respect to the original complaint. This conclusion, however, does not dispose of the question of whether or not the Board should inquire into the new complaints. Section 79(4) of the Act states that the Board may inquire into a complaint of a contravention of the Act. The general discretion given to the Board in this regard is clearly wide enough to empower the Board to refuse to inquire into a complaint even where the subject matter of that complaint is not *res judicata*.

7. There are numerous reasons why the Board might dismiss a complaint under section 79 of the Act. For example, a complaint will be dismissed after a full hearing if the Board concludes that it is without merit. It will also be dismissed if the complainant seeks to withdraw the complaint part way through the hearing without the consent of the respondent. The Board will also dismiss a complaint if the complainant fails to attend at the hearing. Whatever the reason behind a dismissal, however, the dismissal does indicate that the complainant did have, or could have had, its complaint adjudicated on its merits. When deciding whether or not to inquire into a subsequent complaint it is proper, in our view, to take into account the fact that the complainant did have, or could have had, an earlier similar complaint adjudicated on its merits.

8. If a complainant is of the view that the Board should not have dismissed an earlier complaint then it may request the Board to reconsider its decision dismissing the complaint. If grounds for such a reconsideration are made out then pursuant to section 95(1) of the Act the Board can either vary or revoke its earlier decision. Where a request for reconsideration is not made, however, or if made refused by the Board, then we are of the view that when considering a subsequent complaint concerning the same subject matter the Board is entitled to assume that the earlier complaint was properly dismissed for the reasons stated in connection with the dismissal.

9. The complainant never formally requested that the Board reconsider its decision dismissing the original complaint. It did, however, lead certain evidence and make certain submissions which while aimed at convincing the Board that it should inquire into the new complaints, would more properly, in our view, have been put forward in support of a request that the Board reconsider its decision dismissing the original complaint. In order to avoid the necessity of any further proceedings in this regard, we propose to deal with that evidence and those representations as if they had been put forward both in support of the contention that the Board should inquire into the two new complaints and also in support of a request for reconsideration.

10. It was the contention of the complainant that its failure to attend at the hearing in the original complaint was due solely to the fact that the Board's Notice of Hearing was only received at its office in Thunder Bay on the date set for the hearing. The Notice of Hearing and the accompanying letter from the Board's Registrar are both dated June 28, 1978. The hearing was set for July 18, 1978. Essentially the position of the complainant is that the material from the Board was held up in the mail during the intervening three week period.

11. It is our view that if a party fails to attend at a hearing due to the fact that it did

not receive adequate advance notice of the time set for the hearing, then its non-attendance should not jeopardize its position. It follows that if the complainant did not, in fact, receive notice of the hearing until July 18, 1978, then we are satisfied that the decision dismissing the original complaint should simply be set aside and a new hearing scheduled to deal with the complaint.

12. In assessing the position of the complainant the provisions of section 102 (1) of the Act must be kept in mind. This section states as follows:

102.-(1) For the purposes of this Act and of any proceedings taken under it, any notice or communication sent through Her Majesty's mails shall be presumed, unless the contrary is proved, to have been received by the addressee in the ordinary course of mail.

13. We believe we can take note of the fact that it generally takes two or three days for material mailed in Toronto to be delivered in Thunder Bay, assuming of course no intervening weekend. Section 102 (3) of the Act is supportive of this time frame in that it provides that a decision mailed by the Board to a party is deemed to have been released on the second day after the day that it was mailed. It is also worth noting in this regard that the original complaint was mailed by the complainant in Thunder Bay on June 23, 1978 and received by the Board on June 26th.

14. June 28, 1978, the date of the original Notice of Hearing, was a Wednesday. In the ordinary course of the mail it would have been received by the complainant either at the end of that week or on the first working day of the following week. Monday, July 3, 1978 was generally celebrated as a holiday in that July 1st, Dominion Day, fell on a Saturday. Thus in the ordinary course of the mail the Notice of Hearing might not have been received at the complainant's office until Tuesday, July 4th. As already noted, the complainant contends that it only received the notice on July 18th.

15. The complainant's business representative was responsible for the handling of the original complaint. He testified that he had not been aware that July 18th was the date set for the hearing until he was telephoned on that day by an officer of the Board concerning the complainant's non-attendance at the hearing. He stated that later that same day his secretary opened the day's mail and came across the Notice of Hearing. In cross-examination the business representative stated that he did not actually see the material from the Board arrive in the office, but only that he saw his secretary open it that day. He also stated that a couple of weeks prior to the date set for the hearing one of the Board's Labour Relations Officers had met with him in Thunder Bay concerning the complaint and that the officer may well have orally advised him of the date set for the hearing. If he had been so advised of the date, continued the business representative, he did not make any note of it. The business representative's secretary, who is the person who actually receives mail addressed to the complainant, did not testify at the hearing. The material received by the complainant from the Board was not placed in evidence, although if it had been and if it had carried a stamp indicating the date of its receipt by the complainant it would likely have been of some assistance in these proceedings.

16. Another factor worthy of consideration is the complainant's conduct during the period leading up to the hearing date set for the original complaint. The Board's general

practice with respect to section 79 complaints is to set a date for hearing at the outset and then to inform the parties of the date so as to allow them time to make the necessary arrangements for the hearing. The complainant is no stranger to the Board and yet at no time during the weeks following the filing of the complaint did the complainant contact the Board to raise the matter of non-receipt of a Notice of Hearing. Even when a Board officer met with the complainant's business representative the latter does not seem to have voiced any concern about not having received a Notice of Hearing. Indeed the business representative concedes that the officer may well have mentioned the hearing date, but that if he did he did not make a note of the date.

17. We recognize that the mail system does not always function the way it should. However, in the vast majority of cases material entrusted to the post office will be delivered in the ordinary course of the mails. Doubtless it is because of this fact that the onus of proving that mailed material was not received in the ordinary course of the mails is placed upon the party alleging such to have been the case. In assessing the complainant's evidence in this regard it strikes us that the complainant did not act in a manner which one might expect of a complainant which has not received a Notice of Hearing. Further, even if it is accepted that the Notice of Hearing was not opened by the business representative's secretary until July 18, 1978, there is no direct evidence to establish that it was only received in the complainant's office that day. Bearing these factors in mind, and taking into account the manner in which the business representative gave his evidence, we are not satisfied that the complainant has proved that it did not receive the Notice of Hearing in the ordinary course of the mails. Rather we are of the view that the complainant likely did receive the Notice of Hearing and that it was through carelessness or inadvertence that it failed to attend at the hearing into the original complaint. This possibility was discussed at the second hearing and indeed counsel for both parties addressed themselves to it. It was the contention of counsel for the complainant that a slip on the part of the business representative should not result in a denial of a remedy to the grievors.

18. When scheduling hearings for all applications before it, including section 79 complaints, the Board is mindful of the fact that in labour relations matters speed is generally of the essence and that delay may cause serious prejudice to one or other of the parties. Because of this, the Board's practice upon receiving an application or complaint is to schedule a hearing in the matter for a fixed time and then to inform the parties of the date set. Variations from this date will generally be allowed only on agreement of the parties or if one party cannot attend on that date due to circumstances beyond its control.

19. In a fairly large number of cases the Board has been asked by respondent employers not to proceed with a hearing into a section 79 complaint on the day scheduled but rather to adjourn the hearing to some later date. Unless the respondent could demonstrate that it could not attend on the date set for reasons beyond its control, the Board has almost invariably refused these requests. If on the date set for the hearing the employer failed to appear, or if it appeared it was only to ask without success for an adjournment and then withdrew, the Board has generally proceeded to inquire into the complaint notwithstanding the absence of the employer and, where warranted, issued a decision in favour of the complainant.

20. A recent example of this is to be found in *WEB Offset Publications Limited* case (File No. 1083-78-U, decision of November 10, 1978, as yet unreported). In that case the re-

spondent employer was represented at a hearing into a section 79 complaint by a law student. The student requested an adjournment of the hearing on the grounds that counsel who generally acted for the employer was on that day serving as a nominee on a board of arbitration and also because the respondent's president was in New York on a business matter. The Board, however, after noting that the respondent could have retained other counsel and that its president had made the choice of going to New York rather than attend at the Board hearing, declined to grant the adjournment. At that point the law student withdrew from the hearing and the Board proceeded to inquire into the merits of the complaint notwithstanding the absence of the respondent employer.

21. Doubtless the Board's manner of scheduling hearings and then declining to vary the date selected except in exceptional circumstances causes some degree of inconvenience to all of the parties that appear before it. Nevertheless, this procedure has the effect of keeping delays in the commencement of hearings to a minimum. This, we believe, is of great benefit in the administration of The Labour Relations Act. Not only does it allow the Board to handle all applications in a more orderly and hence generally more expeditious manner, but it also eliminates at least one possible source of delay in Board proceedings. Having regard to the fact that the Board generally deals with fluid situations where delay will cause prejudice, it is our opinion that this manner of proceeding is conducive to the general well-being of sound labour relations in the province.

22. One result of the Board's system of scheduling hearings is that parties must take care both to ensure that hearing dates are not missed and also that they have properly prepared themselves for the hearing, which includes ensuring the attendance of essential witnesses.

23. Where a complainant has had a section 79 complaint dismissed due to its non-attendance at a hearing, or a respondent has had a finding made against it notwithstanding its absence from the hearing, we are of the view that having regard to the considerations set out above the absent party bears the onus of showing grounds why the subject matter of that complaint should later be inquired into. This could be done in just about every case by showing that its failure to attend was occasioned by factors beyond its control. Where this was not the case, however, then a careful weighing of a number of considerations must be undertaken.

24. One such consideration is the reason for the party's non-attendance at the original hearing. In the instant case we are of the view that the most likely cause of the complainant's non-attendance was inadvertence on the part of its business representative. Inadvertence, however, is not a particularly strong ground for relief. Further, although the inadvertence was not the fault of the grievors, by having the complainant act as their agent in bringing the initial complaint the grievors did put themselves in a position where their rights might be affected by negligent acts of the complainant.

25. Another factor worth considering is the nature of the complaint. In the instant case the grievors are carpenters who were doing some construction work for the respondent, an Ottawa Valley based contractor, in the District of Thunder Bay. Employment relationships in the construction industry tend to lack the same degree of permanency found in most other industries. Instead employees find themselves directly affected by employers' fluctuating demands for manpower. As the level of activity of one employer begins to de-

cline he generally lays off some of his employees. These employees in turn seek to find employment with other employers whose manpower needs are expanding. (Indeed it is interesting to note that the respondent's position is that the grievors were laid off in accordance with established company practice due to a lack of work). In our view, the general lack of permanence in employment relationships in the construction industry mitigates against departing from the general principle that a party seeking its rights before the Board must be careful to ensure that it is in attendance at the hearing scheduled for that very purpose.

26. In the interests of sound industrial relations policy and the orderly administration of the Act, we are of the view that parties must take care to ensure they attend at scheduled Board hearings. We are also of the view that where a complaint is dismissed because of a failure of a complainant to attend at the hearing, or a complaint is upheld in the absence of the respondent, as a general principle the Board should not permit the subject matter of the complaint to be re-opened unless sufficient grounds for so doing have been advanced by the absent party. In the instant case we are not satisfied that the factors considered above provide such grounds. Accordingly we are of the view that the Board should not now inquire into the subject matter of the original complaint.

27. Accordingly the Board declines to reconsider its decision in File No. 0582-78-U. The Board also declines to inquire into the two instant complaints.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING DECEMBER 1978

BARGAINING AGENTS CERTIFIED DURING DECEMBER

No Vote Conducted

1287-77-R: United Cement, Lime and Gypsum Workers International Union A.F.L., C.I.O., C.L.C. (Applicant) v. Willroy Mines Limited (Milton Limestone Aggregates Division) (Respondent).

Unit: "all owner/operator drivers who are dependent contractors of the respondent working at or out of its Quarry in the Town of Milton, Ontario, save and except foremen, persons above the rank of foreman, dispatchers, watchmen, office and sales staff and persons covered by subsisting collective agreements." (28 employees in the unit). (*Having regard to the agreement of the parties*).

1905-77-R: Service Employees Union, Local 204, Affiliated with the S.F. of L., C.I.O., C.L.C. (Applicant) v. Chelsey Park Nursing Home (Respondent).

Unit: "all office and clerical employees of Chelsey Park Nursing Home in Mississauga, Ontario, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period and employees covered by subsisting collective agreements." (2 employees in the unit). (*Having regard to the agreement of the parties*).

2007-77-R: Fuel Oil & Natural Gas Service Technicians Association (Applicant) v. Comfort Guard Services, a division of Canadian Fuel Marketers Group, Inc. (Respondent) v. Fuel, Bus, Limousine, Petroleum Drivers and Allied Employees, Local No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Intervener).

Unit: "all licensed fuel oil and licensed natural gas service contractors including air condition service contractors who provide services for the respondent at and out of the offices of the respondent in the Municipality of Metropolitan Toronto." (44 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note* – See Report of full decision (1978) OLRB Rep. December).

0298-78-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Rest Haven Nursing Home of St. Williams 1974 Ltd. (Respondent).

Unit: "all employees of the respondent at St. Thomas, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period and office and clerical staff." (19 employees in the unit).

0299-78-R: London and District Service Worker's Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Rest Haven Nursing Home of St. Williams 1974 Ltd. (Respondent).

Unit: "all employees of the respondent at St. Thomas who are regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and ex-

cept supervisors, persons above the rank of supervisor, registered and graduate nurses and office and clerical staff.” (18 employees in the unit).

0328-78-R: Canadian Union of Public Employees (Applicant) v. Art Gallery of Ontario (Respondent).

Unit #1: “all professional employees of the respondent in the Municipality of Metropolitan Toronto, save and except Branch Heads, those above the rank of Branch Heads, the following Department Heads: – Activity Centre, Audio-Visual Centre, Media Productions, Technical Services, Design Unit, Registrar, Chief Preparator, Librarian, Library Co-ordinator, Co-ordinator of Photographic Services, Head Photographer, Curatorial Co-ordinator, Grange Keeper, Senior Education Officer (Elementary Tours), Senior Education Officer (Secondary Tours), Assistant to Chief Preparator, Assistant to Branch Head Extension Services, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (152 employees in the unit). (*Having regard to the agreement of the parties*). (*Dismissed*).

Unit #1(a): “all professional employees of the respondent in the Municipality of Metropolitan Toronto, regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (23 employees in the unit.) (*Having regard to the agreement of the parties*). (*Certified*).

Unit #2: “all support staff employees of the respondent in the Municipality of Metropolitan Toronto, save and except the Secretary to Director, Administrative Assistant to Director, Secretary to Secretary-Treasurer, Branch Heads and those above the rank of Branch Head, Maintenance Department Supervisor, Chief Accountant, Manager of Dining Services, Head Chef, Gallery Shop Administrator, Personnel Officer, Membership Officer, Co-ordinator of Gallery Activities, Head of Communications, Head of Information Services, Assistant to the Co-ordinator of Gallery Activities, Assistant Manager-Secretary of Dining Services, Administrative Secretary to Branch Head of Education Services, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (85 employees in the unit). (*Having regard to the agreement of the parties*). (*Dismissed*).

Unit #2(a): “all support staff employees of the respondent in the Municipality of Metropolitan Toronto, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except the assistant to the personnel officer.” (8 employees in the unit). (*Having regard to the agreement of the parties*). (*Certified*).

0572-78-R: Canadian Union of Public Employees (Applicant) v. The Corporation of The County of Wellington Department of Social Services (Respondent).

Unit: “all employees employed by the respondent in the County of Wellington in the Department of Social Services save and except Family Counsellor, Supervisor, persons above the rank of Supervisor, persons employed for not more than 24 hours per week and students employed during the school vacation period.” (37 employees in the unit).

0669-78-R: Labourers’ International Union of North America Local 1081 (Applicant) v. Dempsey Construction Limited and D. R. D. Excavators Limited (Respondents).

Unit: “all construction labourers in the employ of the employer in the Counties of Brant and Norfolk, save and except for non-working foremen and persons above the rank of non-working foreman.” (10 employees in the unit).

0672-78-R: Hotel, Restaurant Employees Union, Local 743 chartered by Hotel and Restaurant Em-

employees and Bartenders International Union (AFL - CIO - CLC) (Applicant) v. Maple City Garment Rental (Division of Maple City Industrial Supply) (Respondent) v. Group of Employees (Objectors).

Unit: "all driver/salesmen employed by the respondent at Chatham, save and except foremen and persons above the rank of foreman." (6 employees in the unit).

0924-78-R: Canadian Union of Public Employees (Applicant) v. Young Men's and Young Women's Hebrew Association (Respondent).

Unit #1: "all office, clerical and technical employees of the respondent at its North Toronto Branch save and except the Executive Director, Assistant Executive Director, Branch Manager, Program Director, Plant Manager, Comptroller, Nursery School Director, Camp-Co-ordinator, Membership Secretary, Men's Health Club Supervisor, Secretary to the Executive Director, Secretary to the Branch Manager, Athletic Director, Group Services Supervisor, persons regularly employed for less than 24 hours per week and students employed during the school vacation period." (employees in the unit). (*Having regard to the agreement of the parties*). (*Certified*).

Unit #2: "all service and maintenance employees of the respondent at its North Toronto Branch save and except the Executive Director, Assistant Executive Director, Branch Manager, Program Director, Plant Manager, Comptroller, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (employees in the unit). (*Having regard to the agreement of the parties*). (*Dismissed*).

0994-78-R: Ontario Public Service Employees Union (Applicant) v. Sault Ste. Marie General Hospital (Respondent) v. Service Employees Union, Local 268 (Intervener).

Unit: "all office and clerical employees employed by the respondent at Sault Ste. Marie, save and except supervisors, persons above the rank of supervisor, Administrative Secretary, Administrative Clerk, Nursing Service Secretary, Personnel Receptionist Clerk Typist, persons not regularly employed for more than 24 hours per week, students employed during the school vacation period and persons covered by subsisting collective agreements." (61 employees in the unit).

0999-78-R: Amalgamated Meat Cutters and Butcher Workmen of North America, A.F.L., C.I.O., C.L.C. (Applicant) v. Maple Lynn Foods Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in the Town of Strathroy, save and except foremen, persons above the rank of foreman, office and sales staff." (54 employees in the unit).

1068-78-R: Canadian Union of Public Employees (Applicant) v. Campbellford Memorial Hospital (Respondent).

Unit #1: "all employees of the respondent at Campbellford save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, technical personnel, supervisors, persons above the rank of supervisor, office and clerical staff, persons employed for not more than 24 hours per week and students employed during the school vacation period." (64 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: "all persons regularly employed for not more than 24 hours per week and students employed during the school vacation period in the employ of the respondent at Campbellford, Ontario." (21 employees in the unit).

1136-78-R: The Canadian Union of Public Employees (Applicant) v. The Belleville Public Library Board (Respondent).

Unit: "all employees of the respondent in Belleville, save and except chief librarian, persons above the rank of chief librarian, chief assistant to chief librarian, secretary to chief librarian, bookkeeper and students employed during the school vacation period." (39 employees in the unit). (*Having regard to the agreement of the parties*).

1209-78-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. A. Simoes Construction Co. Ltd. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the District of Kenora, including the Patricia Portion, save and except non-working foremen and persons above the rank of non-working foreman." (9 employees in the unit).

1235-78-R: The Carpenters' District Council of Toronto and Vicinity on behalf of locals 27, 666, 681, 1133, 1304, 1747, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Fleet General Contracting Ltd. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Simcoe, the District Municipality of Muskoka and the Township of Thorah and all land north thereof in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

1247-78-R: Canadian Union of Public Employees (Applicant) v. Kitchener-Waterloo Regional Ambulance Ltd. (Respondent).

Unit #1: "all employees of the respondent engaged in ambulance service operations in the Regional Municipality of Waterloo, save and except supervisor, persons above the rank of supervisor, office staff, dispatchers, persons not regularly employed for more than twenty-four (24) hours per week and students employed during the school vacation period." (9 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent engaged in ambulance service operations in the Regional Municipality of Waterloo for not more than twenty-four (24) hours per week, save and except supervisors, persons above the rank of supervisor and office staff." (3 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #3: "all dispatchers of the respondent engaged in ambulance service operations in the Regional Municipality of Waterloo, save and except dispatch supervisors." (2 employees in the unit). (*Having regard to the agreement of the parties*).

1311-78-R: Hotels, Clubs, Restaurants, Tavern Employees' Union, Local 261 (Applicant) v. Nicholson's Restaurant, Steak House & Tavern (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in the municipality of Pembroke, save and except manager, supervisors, office staff and persons employed for not more than 24 hours a week." (27 employees in the unit). (*Having regard to the agreement of the parties*).

1337-78-R: Labourers' International Union of North America, Local 506 (applicant) v. Di Tomizio Construction Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario employed on building projects, except residential building projects, but including labourers em-

ployed as helpers of bricklayers and plasterers, save and except non-working foremen and persons above the rank of non-working foreman." (9 employees in the unit).

1341-78-R: Labourers' International Union of North America, Local 837 (Applicant) v. Ball Brothers Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in the unit). (*Having regard to the agreement of the parties*).

1347-78-R: Labourers' International Union of North America, Local Union No. 597 (Applicant) v. M. A. Butt Construction Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Counties of Peterborough, Victoria and the Provisional County of Haliburton, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

1348-78-R: Labourers' International Union of North America, Local 506 (Applicant) v. Hespeler Concrete Floors Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario employed on building projects, except residential building projects, but including labourers employed as helpers of bricklayers and plasterers, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

1349-78-R: Labourers' International Union of North America, Local 506 (Applicant) v. Pentagon Construction Canada Inc. (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the county of Halton and the Township of Pickering in the County of Ontario employed on building projects, except residential building projects, but including labourers employed as helpers of bricklayers and plasterers, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit). (*Having regard to the agreement of the parties*).

1352-78-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.) (Applicant) v. American Hoist of Canada Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Brampton, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (200 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note* – see Report of full decision (1978) OLRB Rep. December).

1353-78-R: Amalgamated Meat Cutters and Butcher Workmen of North America (Applicant) v. Peterborough Packers Ltd. (Respondent).

Unit: "all employees of the respondent at R.R. #2 Indian River, County of Peterborough, save and except foremen, persons above the rank of foreman, office staff, sales staff and persons employed for not more than 24 hours per week." (16 employees in the unit). (*Having regard to the agreement of the parties*).

1359-78-R: United Electrical, Radio and Machine Workers of America (UE) (Applicant) v. Durham Metal Stamping & Assemblies Ltd. (Respondent) v. Employee's Committee (Intervener) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Pickering, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (92 employees in the unit).

1364-78-R: Canadian Union of Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Applicant) v. Coca-Cola Ltd. (Respondent).

Unit: "all office employees of the respondent at Sudbury, save and except office manager, persons above the rank of office manager, foremen and sales supervisor." (3 employees in the unit).

1379-78-R: Labourers' International Union of North America Local 247 (Applicant) v. A. V. Tenant General Contractor Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in the County of Lennox and Addington, and the County of Frontenac and the Townships of Rear of Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

1381-78-R: United Brotherhood of Carpenters and Joiners of America (Applicant) v. Wm. S. Burnside Ltd. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Lanark, and the Townships of South Crosby, Bastard, Kitley, Wolford, Oxford (on Rideau) and South Gower and all lands north thereof in the United Counties of Leeds and Grenville, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

1382-78-R: Labourers' International Union of North America, Local 183 (Applicant) v. York Hanover Development Ltd. (K. von Wersebe In Trust) – The Lawrence Group (Respondent).

Unit: "all employees of the respondent engaged in Cleaning & maintenance at 'Lawrence Park' 1577 Lawrence Ave., West Toronto including resident superintendents, save and except the property superintendent, building Manager, maintenance superintendent and property manager, persons above the Rank of Property Manager, office and clerical staff." (4 employees in the unit). (*Having regard to the agreement of the parties*).

1384-78-R: Labourers' International Union of North America, Local 183 (Applicant) v. York - Hanover Development Ltd. (L. von Wersebe in trust) The Lawrence Group (Respondent).

Unit: "all employees of the Respondent engaged in cleaning and maintenance at 'Lawrence Terrace' 1440 and 1442 Lawrence Ave., W., Toronto, including resident superintendents, save and except the property superintendents Building managers, maintenance superintendents and property managers

persons above the rank of property manager, office and clerical staff.” (6 employees in the unit). (*Having regard to the agreement of the parties*).

1392-78-R: United Brotherhood of Carpenters and Joiners of America, Local Union 446 (Applicant) v. Wawa Builders, A Division of George Riffer Limited (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman.” (7 employees in the unit).

1394-78-R: Canadian Union of Public Employees (Applicant) v. Guelph General Hospital (Respondent) v. Group of Employees (Objectors).

Unit: “all office and clerical employees of the respondent at Guelph, save and except supervisors, persons above the rank of supervisor, persons covered by existing agreements, secretary to the Administrator, secretary to the Assistant Administrator, secretary to the Personnel Director, secretary to the Director of Patient Services, Payroll Supervisor, Bookkeeper, and persons regularly employed for not more than 24 hours per week.” (27 employees in the unit).

1411-78-R: Teamsters Union Local 938 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Western Dispatch Inc. operating as Western Dispatch Company (Respondent).

Unit: “all employees of the respondent working at Metropolitan Toronto, save and except dispatchers, supervisors, persons above the rank of dispatchers or supervisors, office and sales staff, contractors, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (26 employees in the unit). (*Having regard to the agreement of the parties*).

1412-78-R: Brewery, Soft Drink, Distillery, Distributors and Miscellaneous Workers Local 1000, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Midland Auto Radiator Manufacturing Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent in Milton, save and except foremen, persons above the rank of foreman, office and sales staff and persons employed for not more than twenty-four (24) hours per week.” (22 employees in the unit).

1420-78-R: Labourers’ International Union of North America, Local 506 (Applicant) v. Ronway Construction Limited (Respondent).

Unit: “all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario employed on building projects, except residential building projects, but including labourers employed as helpers of bricklayers and plasterers, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit).

1421-78-R: Labourers’ International Union of North America, Local 506 (Applicant) v. Amor Forming Limited (Respondent).

Unit: “all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of

Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario employed on building projects, except residential building projects, but including labourers employed as helpers of bricklayers and plasterers, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit).

1429-78-R: International Association of Bridge, Structural and Ornamental Ironworkers, Local Union 721 (Applicant) v. Intergrated Lighting Canada Ltd. (Respondent) v. Ontario Acoustical and Drywall District Council on behalf of Locals 1617, 1316, 785 and 2041 of the United Brotherhood of Carpenters and Joiners of America (Intervener).

Unit: “all ironworkers and ironworkers’ apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in the unit).

1436-78-R: Carpenters’ District Council of Toronto and Vicinity on behalf of Locals 27, 666, 1133, 1304, 1963, 2480, 2482, 3227, 1747 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. The Corporation of the City of Toronto (Respondent) v. Toronto Civic Employees Union, Local 43, C.U.P.E. (Intervener).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario engaged on construction projects, save and except non-working foremen and persons above the rank of non-working foreman.” (employees in the unit). (*clarity note* – see Report of full decision (1978) OLRB Rep. December).

1452-78-R: Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Teskey Construction Co. Limited & Teskey Concrete Co. Limited (Respondent).

Unit: “all employees of the respondent working at Metropolitan Toronto, save and except foremen, persons above the rank of foreman, watchmen, office staff and persons covered by subsisting collective agreements.” (18 employees in the unit).

1473-78-R: International Union of Operating Engineers, Local 793 (Applicant) v. H. Kerr Construction Limited (Respondent).

Unit: “all employees of the respondent in the County of Ontario (except the Townships of Pickering, Rama, Mara and Thorah) and the County of Durham (except the Township of Hope) engaged in the operating of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in the unit).

1477-78-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Applicant) v. Alexandria Footwear Limited (Respondent).

Unit: “all employees of the respondent at Alexandria, Ontario, save and except office and clerical staff, foremen, persons above the rank of foreman and students employed during the school vacation period.” (82 employees in the unit).

1485-78-R: Sheet Metal Workers' International Association Local 285 (Applicant) v. J. W. Watson Heating and Air Conditioning Limited (Respondent).

Unit: "all sheet metal workers and sheet metal apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (13 employees in the unit).

1490-78-R: International Brotherhood of Painters and Allied Trades - Local Union 1891 (Applicant) v. Ace Drywall 375669 Ontario Ltd. (Respondent).

Unit: "all painters and painters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit). (*clarity note* – see Report of full decision (1978) OLRB Rep. December).

1491-78-R: Service Employees International Union A.F. of L., C.I.O., C.L.C. (Applicant) v. Prince Edward County Memorial Hospital (Respondent).

Unit #1: "all employees of the respondent at Picton employed as office and clerical staff, save and except technical personnel, supervisors, persons above the rank of supervisor, secretary to the Administrator, secretary to the Directory of Nursing, persons regularly employed for not more than 24 hours per week and persons covered by subsisting collective agreements." (6 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent at Picton regularly employed for not more than 24 hours per week, save and except office and clerical staff, technical personnel, supervisors, persons above the rank of supervisor, secretary to the Administrator, secretary to the Director of Nursing and persons covered by subsisting collective agreements." (3 employees in the unit). (*Having regard to the agreement of the parties*).

1495-78-R: Canadian Food and Allied Workers Union Local 633, Chartered by The Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Applicant) v. Donny's Meats (Finch) Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in its store at Toronto, Ontario, save and except persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (7 employees in the unit). (*Having regard to the agreement of the parties*).

1505-78-R: International Association of Machinists and Aerospace Workers District Lodge 717 (Applicant) v. Central Parts Distribution Centre of Mack Canada Inc. (Respondent).

Unit: "all employees in the respondent's Central Parts Distribution Centre in Bramalea, save and except foremen, persons above the rank of foreman, office and sales staff." (20 employees in the unit).

1510-78-R: Labourers' International Union of North America, Local 183 (Applicant) v. Jane Wilson Towers Limited (Respondent).

Unit: "all employees of the respondent engaged in cleaning and maintenance at 160 - 170 - 180 - 200 Chalkfarm Drive, Downsview, including resident superintendents, save and except property managers, persons above the rank of property manager, office and clerical staff." (15 employees in the unit).

1524-78-R: Christian Labour Association of Canada (Applicant) v. United Mennonite Home for the Aged (Respondent).

Unit: "all registered and graduate nurses employed by the respondent at its Home in the Town of Lincoln, save and except head nurses and persons above the rank of head nurse, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period." (7 employees in the unit). (*Having regard to the agreement of the parties*).

1537-78-R: International Chemical Workers Union (Applicant) v. E. Harris Company, Division of Sherwin Williams Co. of Canada Ltd. (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, those above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period." (6 employees in the unit). (*Having regard to the agreement of the parties*).

1542-78-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. The Stratford Shakespearean Festival Foundation of Canada (Respondent).

Unit: "all employees of the Respondent at Stratford, engaged in maintenance of the buildings and grounds and plant operations save and except foremen, persons above the rank of foreman and supervisor, office and sales staff, students employed during the school vacation period and employees covered by existing collective agreements between the Respondent and other trade unions." (19 employees in the unit). (*Having regard to the agreement of the parties*).

Applications Certified Subsequent to Pre-Hearing Vote

1314-78-R: International Union of Operating Engineers Local 796 (Applicant) v. Sunnybrook Hospital (Respondent) v. Canadian Union of Operating Engineers & General Workers (Intervener).

Unit: "all licensed stationary engineers and helpers employed by the respondent in Metropolitan Toronto engaged in the operation of air conditioners and heating equipment save and except Assistant Chief Engineer and those above the rank of Assistant Chief Engineer (15 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		15
Number of persons who cast ballots		14
Number of ballots marked in favour of applicant	13	
Number of ballots marked in favour of intervener	1	

1399-78-R: International Union of Operating Engineers, Local 796 (Applicant) v. North York General Hospital (Respondent) v. Canadian Union of Operating Engineers & General Workers (Intervener).

Unit: "all stationary engineers, air conditioning operators and persons engaged as their helpers in the respondent's boiler room in Metropolitan Toronto, save and except the chief engineer and persons above the rank of chief engineer." (10 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		10
Number of persons who cast ballots		10
Number of ballots marked in favour of applicant	6	
Number of ballots marked in favour of intervener	4	

Applications Certified Subsequent to Post-Hearing Vote

0232-78-R: Labourers' International Union of North America, Local 183 (Applicant) v. W.C.D. Forming Co. (Respondent) v. Labourers' International Union of North America, Local 506 (Intervener #1) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener #2). (*Dismissed*).

- and -

0401-78-R: Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Applicant) v. W.C.D. Forming Co. (Respondent) v. Labourers' International Union of North America, Local 506 (Intervener #1) v. General Contractors' Section of Toronto Construction Assoc. (Intervener #2). (*Certified*).

- and -

0417-78-R: Labourers' International Union of North America, Local 183 (Applicant) v. W.C.D. Forming Co. (Respondent) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener #1) v. General Contractors' Section of the Toronto Construction Assoc. (Intervener #2). (*Dismissed*).

Unit: "all cement masons and cement masons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (15 employees in the unit).

Number of names of persons on revised voters' list		8
Number of persons who cast ballots		8
Number of ballots marked in favour of Local 598 of the Operative Plasterers and Cement Masons, International Association of the United States and Canada	1	
Number of ballots marked in favour of Labourers' International Union of North America, Local 183	7	
Number of ballots marked in favour of Labourers' International Union of North America, Local 506	0	

1095-78-R: Canadian Guards Association (Applicant) v. York University (Respondent) v. International Union, United Plant Guard Workers of America, Local 1962 (Intervener).

Unit: "all security officers in the Department of Safety and Security Services employed to protect the property of York University in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (34 employees in the unit). (*Having regard to the agreement reached by the parties*).

Number of names of persons on list as originally prepared by employer		34
Number of persons who cast ballots		34
Number of ballots marked in favour of applicant	19	
Number of ballots marked in favour of intervener	15	

1172-78-R: Service Employees International Union, affiliated with A.F. of L., C.I.O., C.L.C. (Applicant) v. Modern Building Cleaning Division of Dustbane Enterprises Limited (Respondent).

Unit: "all employees of the respondent at the campus of Carleton University, Ottawa, Ontario, save and except foremen, persons above the rank of foreman, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (68 employees in the unit).

Number of names of persons on revised voters' list		51
Number of persons who cast ballots		43
Number of spoiled ballots	2	
Number of ballots marked in favour of applicant	41	
Number of ballots marked against applicant	0	

APPLICATIONS FOR CERTIFICATION DISMISSED

No Vote Conducted

1135-77-R: Ontario Haulers Union (Applicant) v. Repac Construction & Materials Limited (Respondent) v. A Council of Trade Unions Acting as the representative and agent of Teamsters' Local Union 230 and Labourers' International Union Of North America, Local Union 183 (Intervener #1) v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers Local Union 230 (Intervener #2) v. Labourers' International Union of North America, Local 183 (Intervener #3) v. The Metropolitan Toronto Road Builders' Association (Intervener #4). (15 employees).

0280-78-R: Association of Commercial and Technical Employees, Local 1704 - Canadian Labour Congress (Applicant) v. Temgo Inc. (Respondent) v. Group of Employees (Objectors). (7 employees).

1122-78-R: Christian Labour Association of Canada (Applicant) v. Salvation Army Grace Hospital (Respondent) v. Canadian Union of Operating Engineers and General Workers (Intervener). (10 employees).

1226-78-R: Christian Labour Association of Canada, Local #150 (Applicant) v. Penn-Mac Construction Co. Ltd. (Respondent). (7 employees).

1227-78-R: Christian Labour Association of Canada (Applicant) v. Reid Aggregates Limited (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener).

Unit: "all employees of the respondent at its operation in Sarnia, save and except the foreman, supervisory personnel, sales and office staff, students employed during the school vacation period and persons regularly employed for not more than 24 hours per week." (2 employees in the unit).

1373-78-R: Labourers' International Union of North America, Local 506 (Applicant) v. George Wimpey Canada Limited (Respondent) v. Labourers' International Union of North America, Local 183 (Intervener). (3 employees).

1404-78-R: Field Price Limited Employee's Association (Applicant) v. Field Price Limited (Respondent) v. Local 92 of International Molders and Allied Workers Union (Intervener). (9 employees).

Certification Dismissed Subsequent to Pre-Hearing Vote

1238-78-R: United Steelworkers of America (Applicant) v. T.C.E. Canada, a Division of Tandy Electronic Limited (Respondent).

Voting Constituency: "All employees of the respondent at Barrie, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period." (30 employees).

Number of names of persons on list as originally prepared by employer		31
Number of persons who cast ballots	30	
Number of ballots marked in favour of applicant	12	
Number of ballots marked against applicant	18	

Certification Dismissed Subsequent to Post-Hearing Vote

7234-78-R: Labourers' International Union of North America, Local 183 (Applicant) v. Cadillac Fairview Corporation Limited (Respondent).

Unit: "all employees of the respondent engaged in cleaning and maintenance at its Park Place Apartment complex, Toronto, including resident superintendents, save and except property manager, persons above the rank of property manager and office and clerical staff." (employees in the unit).

Number of names of persons on list as originally prepared by employer		49
Number of persons who cast ballots	47	
Ballots segregated and not counted	1	
Number of spoiled ballots	2	
Number of ballots marked in favour of applicant	2	
Number of ballots marked against applicant	42	

APPLICATIONS FOR CERTIFICATION WITHDRAWN

1302-78-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. Patrick Harrison & Company Limited, Patrick Harrison & Co. Ltd., Harrison Group & Bradford-Harrison & Associates Ltd. (Respondent). (15 employees).

1375-78-R: The United Brotherhood of Carpenters and Joiners of America (Applicant) v. Patrick Harrison & Company Limited, Patrick Harrison & Co. Ltd., Harrison Group & Bradford Harrison & Associates Ltd. (Respondent). (2 employees).

1376-78-R: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1963, 2480, 2482, 3227, 1747 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. J. D. S. Investments Ltd. (Respondent). (4 employees).

1379-78-R: Labourers' International Union of North America, Local 247 (Applicant) A.V. Tennant General Contractor Limited (Respondent). (3 employees).

1395-78-R: International Union of Operating Engineers, Local 793 (Applicant) v. Aapco Asphaltting Limited (Respondent). (2 employees).

1403-78-R: Labourers' International Union of North America, Local 506 (Applicant) v. J.D.S. Investments Limited (Respondent). (7 employees).

1428-78-R: Teamsters Local 879 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Northland Bitulithic Limited (Respondent). (5 employees).

1442-78-R: The Ontario Acoustical and Drywall District Council, United Brotherhood of Carpenters and Joiners of America on behalf of its affiliated Local Unions 785, 1316, 1617 and 2041 (Applicant) v. Intalite (a division of Integrated Lighting Canada Limited (Respondent). (8 employees).

1472-78-R: International Union of Operating Engineers, Local 793 (Applicant) v. H. Kerr Construction Ltd. (Respondent). (27 employees).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1028-78-R: Gerald K. Taylor, Walter Hudec, Kelly Taylor and Ronald Arthur Cox (Applicants) v. I.B.E.W., Local 105, 300 Fennell Avenue East, Hamilton, Ontario (Respondent). (*Granted*).

Unit: "all electricians and electricians apprentices in the employ of Simcoe Electric Limited within Wentworth County, the Township of Seneca, Rainham, North Cayuga, South Cayuga, Oneida and Walpole, in Haldimand County and that portion of Halton County west of the Eighth Concession Line and South of Highway 401 and Brant and Norfolk Counties in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

Number of names of persons on revised voters' list		6
Number of persons who cast ballots		5
Number of ballots marked in favour of Respondent	0	
Number of ballots marked against Respondent	5	

1059-78-R: Eric Douglas McLarty and William Arthur Stewart (Applicants) v. Retail Clerks Union, Local 206 (Respondent). (54 employees). (*Dismissed*).

1060-78-R: Louise Charette (Applicant) v. Retail Clerks Union, Local No. 486 (Respondent).

- and -

1061-78-R: Guy Perron (Applicant) v. Retail Clerks Union, Local 486 (Respondent). (18 employees). (*Dismissed*).

1153-78-R: Anthony Iantorno (Applicant) v. Teamsters Local 419 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Respondent) v. Cleanol Services (Intervener). (*Dismissed*).

Unit: "all employees of Cleanol Services at Metropolitan Toronto, save and except foremen and dispatchers, persons above the rank of foreman and dispatcher, office staff and persons regularly employed for not more than 24 hours per week." (72 employees in the unit).

Number of names of persons on list as originally prepared by employer		69
Number of persons who cast ballots	65	
Number of spoiled ballots	1	
Number of ballots marked in favour of Respondent	37	
Number of ballots marked against Respondent	27	

1161-78-R: Mr. R. Scott Shute (Applicant) v. International Molders & Allied Workers Union (Respondent). (24 employees). (*Dismissed*).

1184-78-R: Union Employees of Waycon International Trucks Ltd. (Applicant) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.) and its Local 35 (Respondent). (6 employees). (*Granted*).

1252-78-R: Trizec Equities Ltd. (Security Guards) (Applicant) v. International Union United Plant Guard Workers of America (Respondent). (8 employees). (*Granted*).

1332-78-R: Miss Christine Torbicki (Applicant) v. Canadian Union of Public Employees (Respondent) v. St. Joseph's Hospital, Guelph (Intervener). (33 employees). (*Dismissed*).

1426-78-R: Greens Ambulance (Full & Part Time) (Applicant) v. London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L. C.I.O., C.L.C. (Respondent). (5 employees). (*Granted*).

1450-78-R: Milnes Fuel Oil Limited (Applicant) v. Fuel, Bus, Limousine, Petroleum Drivers and Allied Employees, Local No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Respondent). (12 employees). (*Withdrawn*).

APPLICATIONS FOR DECLARATION THAT STRIKE UNLAWFUL

0670-78-R: George Wimpey (Canada) Limited (Applicant) v. United Brotherhood of Carpenters and Joiners of America, Local Union 1946, F. Collver, M. Biro and P. Fedoruk, M. Grout and J. Kellett (Respondents). (*Dismissed*).

1503-78-R: Ontario Educational Communications Authority (Applicant) v. National Association of Broadcast Employees and Technicians CLC, and its Local 72, Kenneth Steel, Gethin James, Denis Roy, Rechilde Volpatti, George Pyron, Robert Baker and Richard Torres (Respondents). (*Withdrawn*).

APPLICATION FOR CONSENT TO PROSECUTE

1441-78-R: The Branch Affiliate of the Ontario Secondary School Teachers' Federation, Fort Frances-Rainy River Division (Applicant) v. The Fort Frances-Rainy River Board of Education (Respondent). (*Withdrawn*).

COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

1390-77-U: Ontario Service Employees Union (Complainant) v. Blackadar Nursing Home Limited (Respondent). (*Withdrawn*).

0104-78-U: Richard Mehringer and Elisabeth Misgeld (Complainants) v. The Bob Miller Book Room Incorporated (Respondent) (*Dismissed*).

1096-78-U: Sandra Tolhurst and Ethel Duncan (Complainant) v. United Carr (Division of TRW Canada Limited) and United-Carr Employees' Association (Respondent).

- and -

1145-78-U: Linda Townson (Complainant) v. United-Carr (Division of TRW Canada Limited) and United-Carr Employees' Association (Respondent). (*Withdrawn*).

1144-78-U: Masonry Contractors' Association (Toronto-Incorporated), Zachary Devuono Limited, et al. (Complainants) v. Toronto Construction Association (General Contractors' Section), et al. (Respondents) v. The Board of Education for the City of Toronto (Intervener #1) v. Bricklayers' Masons Independent Union of Canada, Local 1 (Intervener #2). (*Dismissed*).

1283-78-U: Teamsters, Chauffeurs, Warehousemen and Helpers Local 880 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Rentway Canada Ltd. (Respondent). (*Withdrawn*).

1292-78-U: Association of Commerical and Technical Employees Local 1704, Canadian Labour Congress (Complainant) v. Temgo Inc. (Respondent). (*Withdrawn*).

1310-78-U: Canadian Union of Operating Enginers & General Workers (Complainant) v. Stax Plastics Limited (Respondent). (*Withdrawn*).

1330-78-U: Hotel, Restaurant Employees Union, Local 743, chartered by Hotel & Restaurant Employees and Bartenders International Union (AFL-CIO-CLC) (Complainant) v. Elias Brothers Big Boy Restaurants of Canada Ltd. (Respondent). (*Withdrawn*).

1355-78-U: Retail Clerks Union, Local 206 Chartered by the Retail Clerks International Union (Complainant) v. Newt Webster Produce Warehouse Ltd. (Respondent). (*Withdrawn*).

1367-78-U: Cecil Claxton et al (Complainant) v. American Federation of Grain Millers International Union (Respondent). (*Withdrawn*).

1368-78-U: United Steelworkers of America (Complainant) v. Jetco Manufacturing Limited (Respondent). (*Withdrawn*).

1413-78-U: United Steelworkers of America (Complainant) v. Condor Tool & Machine Limited (Respondent). (*Withdrawn*).

1422-78-U: Brewery, Soft Drink, Distillery, Distributors and Miscellaneous Workers Local 1000 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Midland Auto Radiator Manufacturing Ltd. (Respondent). (*Withdrawn*).

1434-78-U: Labourers' International Union of North America, Local 183 (Complainant) v. York-Hannover Developments Ltd. and Peter Bremmer and Christine Swabey (Respondents). (*Withdrawn*).

1438-78-U: Canadian Union of Public Employees and its Local 2199 (Complainant) v. Madonna Nursing Home (Respondent). (*Withdrawn*).

1448-78-U: Mrs. Shirley White (Complainant) v. Retail Wholesale and Dept. Store Union Local 414 AFL-CIO-CLC, and Dominion Store Limited (Respondents). (*Withdrawn*).

1454-78-U: Local Union 1687 of the International Brotherhood of Electrical Workers (Complainant) v. Badgerow Electric Co. (Respondent). (*Withdrawn*).

1455-78-U: Local Union 1687 of the International Brotherhood of Electrical Workers (Complainant) v. Badgerow Electric Co. (Respondent). (*Withdrawn*).

1457-78-U: United Brotherhood of Carpenters & Joiners of America, Local 2737 (Complainant) v. Fairline Boats Ltd. (Respondent). (*Withdrawn*).

1458-78-U: International Molders' and Allied Workers' Union (Complainant) v. Riverdale Frozen Foods Limited (Respondent). (*Withdrawn*).

1461-78-U: United Steelworkers of America (Complainant) v. Galt-British Forge Company (Respondent). (*Withdrawn*).

1527-78-U: United Brotherhood of Carpenters and Joiners of America, Local Union 446 (Complainant) v. Wawa Builders, a Division of George Riffer Limited (Respondent). (*Withdrawn*).

1533-78-U: George Pelly (Complainant) v. Laborer's International Union of North America, Local 1267 (Respondent). (*Withdrawn*).

1589-78-U: International Association of Machinists and Aerospace Workers (Complainant) v. Comet Express/Oldsport Express (Respondent). (*Withdrawn*).

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0397-78-R: Canadian Food and Allied Workers and Local Unions 175 and 633, Chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America, A.F.L.-C.I.O.-C.L.C. (Appli-

cant) v. Loblaws Limited and Gordons Markets a Division of Zehrmart Limited (Respondents). (*Granted*).

1489-78-R: International Brotherhood of Painters and Allied Trades, and The Ontario Council of the International Brotherhood of Painters and Allied Trades, and the International Brotherhood of Painters and Allied Trades, Local Union 1824 (Applicants) v. Arwa Motor Starter & Generator Service Limited, and Parkway Equipment Inc. (Respondents). (*Withdrawn*).

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1268-78-M: Ontario Public Service Employees Union (Applicant) v. Sault College of Applied Arts & Technology (Respondent). (*Withdrawn*).

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1573-77-M: Canadian Union of Public Employees and its Local 1797 (Applicant) v. The Catholic Children's Aid Society of Hamilton-Wentworth (Respondent). (*Granted*).

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1207-78-M: Labourers' International Union of North America, Local 183 (Applicant) v. The Ontario Form Work Association (Respondent). (*Granted*).

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1293-78-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada Local Union 508 (Applicant) v. C. B. Beamer and Co. Ltd. (Respondent). (*Dismissed*).

1322-78-M: Christian Labour Association of Canada (Applicant) v. Mirtren Contractors Limited (Respondent). (*Withdrawn*).

1357-78-M: The International Brotherhood of Painters and Allied Trades and the Ontario Council of the International Brotherhood of Painters and Allied Trades and International Brotherhood of Allied Trades, Local 1824 (Applicants) v. Parkway Equipment Inc. and International Brotherhood of Painters and Allied Trades Employer Bargaining Agency (Respondents). (*Withdrawn*).

1425-78-M: International Union of Operating Engineers, Local 793 (Applicant) v. Metropolitan Toronto Road Builders Association and its affiliated Prospect Paving Limited (Respondents). (*Withdrawn*).

1435-78-M: Carpenters' District Council of Toronto and Vicinity, Locals 27, 666, 1133, 1747, 1304, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Emery Contracting Limited (Respondent). (*Terminated*).

1466-78-M: Labourers International Union of North America, Local 183 (Applicant) v. Teskey Construction Co. Ltd. (Respondent). (*Withdrawn*).

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1513-78-M: Labourers' International Union of North America, Local 183 (Applicant) v. Tru-Wall Group Ltd. (Respondent). (*Withdrawn*).

1572-78-M: United Brotherhood of Carpenters & Joiners of America, Local 18 (Applicant) v. Dry-wall By Jamieson (Respondent). (*Withdrawn*).

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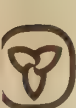
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0747-78-R: Harry William Hubert (Applicant) v. Hotel, Restaurant Employees Union, Local 743, affiliated with Hotel & Restaurant Employees and Bartenders International Union (AFL-CIO-CLC) (Respondent) v. Windsor Raceway Holdings Limited (Intervener). (*Termination*). (*Request Denied*).

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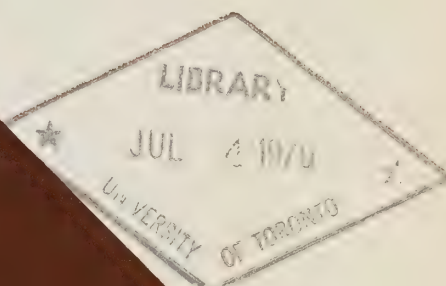
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Cited [1979] OLRB REP.

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Discharge for Union Activity – S-79 – Board finding discharge not motivated by anti-union considerations – Complaint dismissed

BEFORE: E. Norris Davis, Vice-Chairman and Board Members C. G. Bourne and B. K. Lee.

APPEARANCES: *Ted Wahl and Bruce Janisse for the complainant; Mrs. Barnes and Donald J. McKillop for the respondent.*

DECISION OF E. NORRIS DAVIS, VICE-CHAIRMAN, AND BOARD MEMBER C. G. BOURNE; February 9, 1979

1. This is a complaint under Section 79 of The Labour Relations Act that the respondent contravened Sections 56 and 58(a) of the Act in discharging the two grievors Rose Northcott and Debby Reaume.
2. The respondent operates a Rest Home of some fifty beds, thirty-seven of which were occupied at the time of these events. The two grievors were employed as Nurses Aides. The complainant union was certified on October 23, 1978 and served notice to bargain on November 7, 1978.
3. On Sunday, November 12, 1978 the two grievors were on day shift duty (7.00 A.M. to 3.15 P.M.) and along with the Cook, Mary De Ritter, were the only employees present on that shift. At the start of the shift the grievors were informed by the night shift staff that, in one of the rooms occupied by two female residents, the carpet floor covering was wet with urine and that they had covered it over with newspapers. This room was on the first floor and contiguous to the Dining Room.
4. The grievors first cleaned up dishes from the Dining Room and then entered the bedroom at about 7.30 A.M. at which time they found a large wet area in front of the bathroom door and a strong urine odor. They opened the windows, made the beds and closed the door while they proceeded to make up other rooms, returning to check this particular room from time to time. About 2.00 p.m. that day they entered the room to remove the rug which was wall to wall carpeting and, as that more or less coincided with tea-time for the residents, one or the other of the grievors would from time to time check the residents in the Dining Room. The grievors found the rug in front of the closet was glued to the floor and was difficult to remove, taking some fifteen minutes. They then rolled up that portion of the loosened rug, replaced one of the beds on the bare floor and then both went for about ten minutes to clean up and do the dishes following tea. Following this they returned to the room and aided by two hammers which had then been brought to the Home by the mother-in-law of one of the grievors in response to a telephoned request by Rose Northcott, completed the rug removing operation.
5. The grievors had located a screwdriver on the premises which they used to pry up the moulding and had also removed a closet door and placed it in the hall while conducting

the rug removal. Once the rug was rolled up, the door was replaced and the moulding hammered back to the floor. They then carried the rug through the Dining Room and the kitchen and placed it outside in the area set aside for garbage. The grievors went off shift at 3.15 p.m.; the occupants of the room were returned to the room for the rest of the day and night.

6. Northcott testified that at the start of her shift on the following day, Monday, she notified the Head Nurse, Mrs. Jarvis, of their actions and states that Jarvis' reacted by saying that the rug "was rotten and about time it came out".

7. Mrs. Linda Barnes, Administrator of the Home, testified that she was at a meeting away from the Home all day Monday and first heard of the matter that evening when she called Mrs. Jarvis to see how things were going. Jarvis reported things were going fine "except we have a problem. We need a new floor" and proceeded to explain the carpet removal.

8. Barnes testified that she had been home Sunday afternoon and evening and had not been consulted about the rug removal and that Jarvis stated she had not been consulted. De Ritter, the cook, testified that Barnes' telephone number was posted on the bulletin board at the Home and that it was quite usual for employees to contact Barnes in this way if there was a problem with a patient, or toilet plugged, etc. In De Ritter's words "they're quite available for anything we can't handle".

9. Barnes, while at her residence, called Northcott on the phone about 10.00 a.m. Tuesday morning and according to Northcott, asked the reason for the rug removal and if any attempt had been made to contact management. Barnes also told Northcott that she hadn't been hired to lay floors and that she would deal with her and Reaume later that afternoon. Northcott told Barnes there had been a lot of complaints and that the rug had produced a very foul odor outside the Dining Room.

10. Barnes went into the Home later that morning and she, in company with Jarvis and Pat Barnes (the husband of the Administrator and responsible for maintenance in the Home) interviewed each of the grievors individually.

11. In the interviews the grievors told Barnes that they had followed the normal procedure of shampooing the rugs with vinegar and water, following which they had opened the windows to air the room but that did not eliminate the odor. Barnes asked whether they weren't under the impression that they were destroying someone else's property and both the grievors individually replied, "yes, we realized that after we did it". Barnes also testified that she informed Northcott that she should have contacted management to which Northcott agreed. Northcott, in her testimony, said that it did occur to them that they should have contacted management but they were then already into the removal operation and it was too late.

12. Barnes told the grievors that she was amazed by their actions and put the question as to whether they had ever thought that destroying Barnes' property could "cost them their jobs". The interviews closed by Barnes asking for a written explanation of what had been done and the reason for it, which explanation both grievors agreed to provide the next day. These explanations were not, in fact, provided based on the advice received from a un-

ion official by Northcott. Barnes waited throughout the grievors' shift on November 15th for the written explanations and then prepared letters of discharge terminating their employment as of November 21st. These letters were sent by registered mail to the grievors and that directed to Northcott was subsequently returned with the notation on the envelope "refused by Sender". The letters contained the following statement:

" After careful review of the circumstances in this instance, management summarized your actions as follows:

- 1) The removal of the floor covering has resulted in damage and destruction of the floor covering and portions of the wood moulding in the room. The cost of replacing and repairing these items is an added expense of the rest home resulting directly from your actions.
- 2 The removal of the floor covering was not included as a part of your duties. During this removal the residents throughout the rest home were unattended and ignored. This neglect of duty on your part cannot be excused.

Because of the above we feel we have no alternative but to terminate your employment as of 12:00 o'clock noon on Tuesday, 21st November 1978.

Yours truly,

(Signed) Linda Barnes

Linda Barnes
Administrator"

13. It was testified that the new wing of this Home, where this particular room was located, initially had all the rooms carpeted but that this has been found impractical and the carpeting has been replaced room by room with only one other room besides this one remaining carpeted at the relevant time. Northcott testified that they had requested of the Head Nurse, Jarvis, several times, over past months, that this particular carpet be removed because of urine odor and that Jarvis had said she contacted Pat Barnes who said "they would be down to remove it". In the case of all other rooms the carpeting had been removed either by an outside floor layer or by Pat Barnes and the Nurse's Aides had never been involved. On Tuesday, November 14th, new flooring (tile) was ordered and was installed by an outside floor layer in the room from which the carpet had been removed.

14. Linda Barnes testified that she was aware the grievors were union members and that "they all are - that's no problem". She denied that part of the reason for discharge surrounded union activities and stated, "That is not the reason I discharged either one of those girls. When I terminated I did it because they left residents unattended. One girl called her mother-in-law on my time and had hammers brought in. Union has nothing to do with this. They destroyed my property that's it".

15. It was established that notice of a union membership meeting had been posted in

the Home. The meeting was for the night of Monday, November 13th and called for the election of stewards and Northcott along with one, Demers, were so elected. The grievor, Reaume, testified that at noon on November 13th, Jarvis asked if the stewards had been picked and Reaume replied in the negative. Reaume states that first thing Tuesday, November 14th, Jarvis again enquired and Reaume informed her that Northcott and Demers had been elected, and also in response to a question, that they had not picked a President and Secretary at that time. Linda Barnes acknowledges that Jarvis had informed her that it was rumoured that Northcott and Demers would be the stewards and that she knew this before sending the discharge letters although she was not certain that she had the knowledge prior to the discharge interviews.

16. The complainants argue that the discipline was disproportionately severe for the offence considering that the complainants had no previous disciplinary record, and that fact, in itself, should persuade the Board against accepting the explanation of the respondent as being the sole reason for discharge. The complainants further argue that the interest of the respondent in knowing the identity of the individuals elected to union office justifies an inference being drawn that this knowledge was a factor in the decision to discharge.

17. It is clear to the Board that carpeting of rooms occupied by sometimes incontinent persons was viewed both by management and employees as a mistake, and that in the case of the carpet relevant here, it was generally accepted that sooner or later it would be removed and replaced by tile. The actual timing of that replacement was not, in our view, a matter to be decided by the complainants – as they themselves recognized in their testimony. The fact that the other carpet removals had not in any way involved Nurse's Aides, and that no attempt was made to gain management approval of the action despite a standing practice of contacting management by telephone if necessitated by an unusual problem, and that organizing the operation included a telephone call to have tools brought in from outside can only point to a conclusion that the complainants had deliberately concluded to take matters into their own hands in eradicating what they considered an undesirable condition.

18. In the pre-discharge interviews by Management the complainants admitted that they had probably been wrong in not having sought prior permission to remove the carpet but that they had acted solely in what they considered the interests of the Home and its residents and that they had taken reasonable precautions to ensure the safety of residents during the time they were engaged in their "extra-curricular" activity. Northcott, during that interview, offered to make amends by herself laying tile on the floor on her own time. Testimony was also given that there had been other occasions on which residents had been left "on their own" as a result of Nurse's Aides being directed by supervisors to engage in special activities outside their regular duties. These are factors which are urged by the complainants as indicating that, irrespective of the existence of cause for discipline, the severity of the discipline imposed was motivated by reasons other than those stated by the respondent.

19. It has long been established that, in cases such as this, the Board must be satisfied of the complete lack of "anti-union animus" in the employer's actions. As is stated in the *Pop Shoppe* case [1976] OLRB June 294 at p. 301,

"The employer cannot engage in anti-union activity under the guise of

just cause or under the guise of business reasons. Regardless of the viable non-union reasons which exist the Board must be satisfied that there does not co-exist in the mind of the employer an anti-union motive.”

and further, in the same case at p. 301

“Not only must the Board ‘see through’ the legitimate reasons which often co-exist with the unlawful, but at the same time the Board must be capable of distinguishing between the unlawful and the unfair. The Board cannot, and neither should it automatically infer, that an employer who has engaged in conduct which is unfair has violated the Act even if the unfair treatment is coincidental with an organizing campaign.”

20. In the instant case, Counsel for the complainants in order to establish an anti-union animus relies on the reported statement of Pat Barnes during the Northcott discharge interview that Northcott “should have joined the Carpenter’s Union” together with the fact that the discharge decision followed the knowledge of Linda Barnes that Northcott had been elected a steward. There is an absence of any other evidence relating to a general anti-union attitude on the part of the respondent and no evidence that either Northcott or Reaume played any significant part in the organizing campaign or had in any other way differentiated their role in union activities from that of other employees. Also, no evidence was led to establish directly or by inference that the disciplinary action taken by the employer represented a departure from its standard of disciplinary administration existing prior to union certification. Additionally, it appears that the organizing campaign, which culminated in the issuance of a certificate, was successful in enlisting all employees but one as union members. The Board, in viewing these total circumstances, is not prepared to ascribe a significance to the two incidents put forward by the complainants from which anti-union animus could be inferred.

21. In respect to the enquiries made by Jarvis relating to the choice of union officers and officials, the Board, based on its experience, finds it not at all unusual that a party who is in a collective bargaining relationship should express interest in the leadership of the other party as a cogent factor of their relations. An enquiry of such a nature under the total circumstances existing here prior to the enquiry must be interpreted quite differently than the same type of enquiry being made in the throes of an organizing campaign: in the former case it is information which must inevitably be made known to the employer so that the relationship can function, while in the latter case it is information which the union may well wish to keep confidential until the organizing campaign is completed to preclude employer interference in that campaign. The Board is therefore of the opinion that it should not, in this case, draw an inference of anti-union animus from the fact of the respondent’s enquiries.

22. The Board places no significance in the statement by Pat Barnes during the discharge interview that Northcott “should have joined the Carpenters Union”. In the total context of the discussions it can have been nothing more than a rhetorical comment.

23. The Board therefore finds that, on the balance of probabilities, the respondent has put forward a credible explanation for its actions, devoid of anti-union animus.

24. The complaints are dismissed.

DECISION OF BOARD MEMBER B. K. LEE:

1. I dissent.

2. The majority decision views as being "not at all unusual" the enquiries made by Helen Jarvis, Assistant Administrator regarding union elections for stewards and other union positions in the local.

3. I find that the information gathered by Jarvis' persistent questioning of one of the grievors on Monday, November 13th at noon and again *first thing* Tuesday, November 14th, is the prime importance particularly when we note that Mrs. Barnes the Administrator waited until about 10.00 a.m. that same day before calling Northcott on the phone. By Barnes own admission, Jarvis had informed her that it was *rumoured* that Northcott and Demers would be stewards and that she knew this before sending the discharge letters but she was not certain that she had the knowledge prior to the discharge interviews.

4. It is difficult to overlook that a distinct possibility exists that Barnes was fully informed not only that Northcott was elected as steward of the union but, that a President and Secretary were still to be elected. I suggest that Jarvis passed along this information that very morning prior to Barnes phone call to Northcott about 10.00 a.m. the same day. Barnes called from her residence, Northcott was at work.

5. The idea that here was a chance to show this union, this freshly elected steward, and anyone else who might presume to run for office what they might expect from management, may very well have been in the mind of Mrs. Barnes as she prepared the pattern of questions for the interview with the women.

6. The majority decision seems to assume that once a certificate is issued the relationship between the parties become quite different. In this case, it is not clear that the relationship between the employer and the union had stabilized, as of yet. The union had only been certified for approximately three weeks and the parties had not yet agreed to a date for a first meeting to commence bargaining for a collective agreement. The union had not had a chance to fully earn the confidence of the members of the bargaining unit. It would be an opportune time for the management to attempt to make a point to its employees about its attitude towards the union, in order to weaken the union's bargaining position.

7. While it is true that the management would inevitably find out who held the union offices, the significance of Jarvis' questions in the circumstances of this case, lie in their timing and the persistence with which they were asked. The questioning occurred the day after the rug incident and successfully the next morning after Jarvis had informed Barnes about the rug and before Barnes phoned. Northcott interviewed her about the incident and issued the discharge letter. It is possible that Barnes was informed of the election results by Jarvis before approaching Northcott. The first indication of a negative reaction to the rug incident by management was in Barnes phone call to Northcott which occurred after Jarvis had obtained the information from Reaume.

8. I find that there is evidence of anti-union animus in the discharge of the two nurs-

es' aides. The very severity of the discipline imposed, having regard to everything that transpired, points to a motivation much more compelling than that put forward by the respondent.

9. The established practice of the Board in this type of complaint is outlined in the *first Pop Shoppe* case [1976] OLRB Rep. June 294 at p. 297 – all of paragraph 11 and first sentence of paragraph 12.

10. I would order both grievors reinstated with full seniority and full compensation for all lost monies and benefits.

1678-78-M Brant County Board of Education, (Employer), v. Female Office Employees' Association, (Trade Union).

Reference – Trade Union Status – Employee association not entitled to conciliation services unless a trade union within meaning of the Act

BEFORE: N. B. Satterfield, Vice-Chairman, and Board Members J. D. Bell and M. J. Fenwick.

APPEARANCES: *Mrs. M. A. Scott for the employer; and Peter Hollyoake for the trade union.*

DECISION OF THE BOARD; February 13, 1979

1. A request has been made to the Minister of Labour under section 15 of The Labour Relations Act by the trade union for the appointment of a conciliation officer. Questions have arisen which, in the Minister's opinion, relate to his authority to make the appointment.

2. The question of whether the Minister has the authority under the Act to appoint a conciliation officer has been referred to the Board pursuant to section 96 of the Act.

3. It is a matter of Board record that it has not granted the trade union (hereinafter called "the Association") in this referral status under section 1(1)(n) of the Act. Certain other facts which give rise to this reference are not in dispute. The employer and "the Association" were parties to a document styled as a memorandum of agreement ("memorandum") which was in effect from Sept. 1/77 to Aug. 31/78. It had been arrived at as a result of negotiations between the parties and contains most of the conditions of employment and many of the rights and obligations commonly found in a collective agreement. There have been two prior agreements of this type between the parties and they were attempting to negotiate a replacement for the one which expired on Aug. 31/78 when "the Association" requested the services of a conciliation officer.

4. The employer, in a letter dated December 19, 1978, addressed to the Minister, opposed the request on the grounds that "the Association" was not a trade union within the meaning of the Act and that no collective agreement had been entered into by the parties.

5. The parties agreed at the hearing that the question of trade union status was a threshold issue which should be determined by the Board first. The Board, having heard and considered the evidence and argument of the parties, advised them at the hearing of its decision that the trade union was not a trade union within the meaning of section 1(1)(n) of the Act. Its reasons therefor are as follows.

6. At the time of its request for the services of a conciliation officer, "the Association" had as its members all of the regular employees of the employer whose conditions of employment were governed by the memorandum of agreement, approximately 100 in number. They are the secretarial and clerical employees. Each employee, on completing six months of employment, paid two dollars annual dues and became a member. Each member receives a membership card. Each year membership is renewed by payment of a further two dollars dues. The executive committee of "the Association" consists of the president, vice-president, secretary-treasurer and the two co-chairmen of its negotiating committee. Election for these offices are held at a general assembly meeting held to ratify the memorandum of agreement. The executive committee recently approved a draft of a constitution which, as of the date of this hearing, has not been presented to the members for approval. There is no evidence before the Board of any prior constitution.

7. Section 1(1)(n) of the Act defines a trade union, in part, as "... an organization of employees formed for purposes that include the regulation of relations between employees and employers ...". The Board, in *Associated Hebrew Schools of Toronto* [1978] OLRB Rep. Sept. 793, had this to say generally about the benefits to an organization which meets that definition and what the Board requires to determine if the organization satisfies the definition.

"Such an organization is entitled, if it otherwise qualifies, to be certified, to negotiate collective agreements and generally to exercise the rights of a trade union under the Act. The Board, in seeking to determine whether an applicant before it is a trade union, requires that it be more than just an informal joining together of individuals. Instead, the Board requires that the applicant be a formal organization whose members have bound themselves together on the basis of specific terms for purposes that include the regulation of relations between employees and employers."

The terms and conditions of the contractual relationship referred to in the above decision of the Board are usually provided by the organization's constitution. The existence of a constitution which has been adopted by the members of the organization seeking trade union status is vital to it being able to convince the Board that the organization satisfies the requirements of section 1(1)(n). For an example of the Board's usual criteria see *Local 199 U.A.W. Building Corporation* [1977] OLRB Rep. July 472.

8. While the Board attempts not to be unduly technical in determining whether its criteria have been met sufficiently that a trade union has come into existence, it must balance the latitude which it may allow with the important rights, privileges and duties which a trade union obtains when it is granted status. In the instant case, while it appears that "the Association" might fail also to satisfy some of the other criteria, it is clear that there is no constitution setting out the terms and conditions of the contractual relationship into which

its members have entered. While the employees have joined an organization and elected officers to it, the organization is something other than a trade union and the Board finds, therefore, that "the Association" is not a trade union within the meaning of section 1(1)(n) of the Act.

9. It follows, therefore, that the conditions precedent to an appointment of a conciliation officer under section 15 of the Act have not been met.

10. In consideration of all of the foregoing circumstances, the answer to the question posed by the Minister is, in our opinion, "no".

1676-78-R Ottawa Steel Plate Printers, Local 6, of International Plate Printers, Dye Stampers and Engravers Union of North America, (Applicant), v. **British American Bank Note Company Limited**, Ontario Bank Note Company Limited, (Respondents).

Sale of a business – Effect of transfer of work together with incidental transfer of valuable asset – held no sale of business

Before: Donald D. Carter, Chairman, and Board Members M. J. Fenwick and W. H. Wightman.

APPEARANCES: *Maurice M. Wright for the applicant; John D. Richard, Q.C. and L. Harn-den for the respondents.*

DECISION OF THE BOARD; February 9, 1979

1. The style of cause of this application is amended by adding "Ontario Bank Note Company Limited" as a respondent.
2. This is an application under section 55 of the *Labour Relations Act* alleging a sale of business, and seeking a declaration that the applicant holds bargaining rights in respect of certain employees of the respondent Ontario Bank Note Company Limited, which will be referred to as O.B.N.
3. The respondent O.B.N. is a wholly-owned subsidiary of the respondent British American Bank Note Company Limited, which will be referred to as B.A.B.N. O.B.N. is treated as a sales and manufacturing division of the parent company B.A.B.N. Both O.B.N. and B.A.B.N. are in the business of printing lottery tickets and bank forms, as well as doing other commercial printing. Operating policy for the two companies is established by the parent company, B.A.B.N., through its policy group. The operations of O.B.N. are located in Toronto, and those of B.A.B.N. in Ottawa.
4. The applicant union is a small, but highly specialized, craft union of steel plate printers. The applicant holds bargaining rights for the plate printers employed by B.A.B.N.

but not those employed by O.B.N., which has not been unionized. The evidence is that the applicant has never attempted to apply for certification as the bargaining agent of the O.B.N. printers.

5. On September 13, 1978, officials of B.A.B.N. and of the applicant met, at which time it was announced by the company that two of B.A.B.N.'s eighteen steel plate presses in Ottawa would be moved to O.B.N. in Toronto. The presses were subsequently moved to Toronto and installed by two persons employed by B.A.B.N. but who were not members of the applicant. By the end of December, the two presses were fully operational and manned by two employees of O.B.N. who had been trained in Toronto by O.B.N.'s plant manager. During the period when this transfer occurred, B.A.B.N. officials met periodically with the officers of the applicant to keep them advised. Meetings were held on September 21st, October 11th, and December 21st. At the October 11th meeting, the officers of the applicant expressed concern over the fact that its members had not been involved in the transfer to the non-union company. Apparently, at that time, and again on December 21st, officials of B.A.B.N. pointed out that the chartered banks had indicated a desire that the corporate group not be totally unionized because of their concern about a secure source of supply.

6. Mr. Clare Vaughan, secretary and vice-president finance of B.A.B.N. and secretary-treasurer of O.B.N., testified that the corporate policy group had decided to move the two presses to Toronto in order to consolidate the printing of Wintario tickets. Previously, basic stock had been printed in Ottawa using steel plate presses and then sent to Toronto for finishing and shipment to the Ontario Lottery Corporation, which would be invoiced by O.B.N. After the transfer, the entire printing of the Wintario tickets was performed by O.B.N. in Toronto. Vaughan also testified that, because of their specialized function, there existed only a small supply of steel plate presses. A related company, Yvon Boulanger Ltée, however, was able to acquire three such presses from outside the corporate group for its operation in Montreal. Vaughan also testified that the transfer of the two presses represented an 8% reduction in production volume for B.A.B.N., but that there would be no loss of employment for the applicant's members.

7. Counsel for the applicant submitted that the transfer to O.B.N. of the two presses and, concomitantly, the work being performed by them constituted a sale of part of B.A.B.N.'s business. In support of this submission it was argued that the transaction involved more than a transfer of chattels and, in fact, constituted a transfer of B.A.B.N.'s "know-how" to O.B.N. This transfer, according to counsel, was motivated by a desire to expand the scope of the non-union operation in Toronto at the expense of the applicant's bargaining rights at B.A.B.N.'s operation in Ottawa.

8. The transfer was characterized in a much different manner by counsel for the respondent, who argued that what had occurred was a transfer of work from one division of the corporate group to another. This transfer, as counsel pointed out, did not result in the lay-off of any members of the applicant's bargaining unit, and was only intended to consolidate the printing of Wintario tickets in Toronto. This rationalization of operations simply amounted to a transfer of chattels from one corporate division to another at a different geographic location, and could not be characterized as the sale of part of a business.

9. The issue before the Board, then, is whether the transfer of the two steel plate presses, and the attendant work, from Ottawa to Toronto constituted a sale of part of

B.A.B.N.'s business. If the transaction amounts to a sale of part of a business, then it would fall within the scope of section 55, and the applicant's bargaining rights would remain attached to that part of the business which was sold. If, however, the transaction is something less than a sale of a business, being merely a transfer of work or a transfer of chattels, then the applicant cannot rely upon section 55 regardless of whether its work jurisdiction may have been eroded by such a transfer.

10. The clear intent of section 55 is to protect bargaining rights upon the sale of a business. As the Board stated in *Marvel Jewellery Ltd.*, [1975] OLRB Rep. Sept. 733,

"... Section 55 recognizes that collective bargaining rights, once attained, should have some permanence. Rights created either by the Act, or under collective agreements, are not allowed to evaporate with a change of employer.

To provide permanence, the obligations flowing from these rights are not confined to a particular employer, but become attached to a business. So long as the business continues to function, the obligations run with that business, regardless of any change of ownership."

11. There are limits, however, to the extent to which section 55 can be used to preserve collective bargaining rights. It is clear that the provisions of this section do not attach bargaining rights to the work being performed by a business but only to the business itself. While this distinction may not be easy to draw in some cases, it is essential that it be maintained since section 55 cannot be interpreted as guaranteeing to a bargaining agent an absolute right of property in the work performed by its members. Section 55 serves only to preserve bargaining rights that have become attached to a business entity so that when that business entity is transferred, either in whole or in part, those bargaining rights survive and bind the successor employer.

12. The determination of whether a transaction constitutes a sale of a business, or whether it amounts to something less than a sale, is one that must be made on the facts. The question in each case is whether the evidence points to a continuation of the same business function as was carried on prior to the transaction. As the Board pointed out in *Thunder Bay Ambulance Services Inc.*, [1978] OLRB Rep. May 467, for a transaction to be considered a sale of a business there must be the continuation of the same business, and not merely the performance of a like function by some other business. The Board, in making this distinction, must look beneath the form of the particular transaction to uncover its essential nature. As in the instant case, a number of considerations must be taken into account before the Board can ascertain the true nature of the transaction.

13. What then is the true nature of the transaction that occurred between B.A.B.N. and O.B.N.? A first consideration, and perhaps the most important one, is that B.A.B.N. and O.B.N. were engaging in similar, but parallel, businesses before the two presses were removed. From the evidence it appears that O.B.N. in its own right possessed the business expertise and "know-how" to operate the two steel plate presses that were moved to its operation in Toronto, and that there was no transfer of such expertise from B.A.B.N. Moreover, it also is clear that the Wintario work was obtained through the business efforts of O.B.N., and not by B.A.B.N. What appears to have happened is that after the transfer of the presses,

it was no longer necessary for O.B.N. to contract out part of this work to B.A.B.N. The loss of work at B.A.B.N., therefore does not appear to flow from the sale of part of B.A.B.N.'s business but, rather, a decision by O.B.N. to do all of the Wintario work.

14. Counsel for the applicant argued that the existence of a common policy group for the two corporations meant that O.B.N.'s business expertise was in fact derived from the parent corporation. If this were the case, and we need make no finding in this regard, then the transaction must be characterized as a transfer of work within the organization of what is essentially a single employer. In other words, where two corporations can be treated as a single business organization, then such a transfer of work could not constitute a sale of a business as that term is defined by section 55 of the Act.

15. A further consideration emphasized by counsel for the applicant was the scarcity of the type of press transferred from B.A.B.N. to O.B.N. While it may be possible for a particular chattel to be so integral to a business that its transfer constitutes a sale of business, the facts in this case do not support such a conclusion. There is no evidence to suggest that the printing of the Wintario work depended entirely upon the two presses that had been transferred. Rather, it appears that O.B.N. might have obtained steel plate presses from other sources or, in the alternative, could have contracted the work out to a printer other than B.A.B.N.

16. In arriving at its determination in this case, the Board has put little weight on the change of the location where the work was performed. Although a business may attach itself to a particular location, there may be cases, such as this one appears to be, where location is not essential to the operation of business, and a sale of a business may occur despite the change of location. The question then becomes one of the extent of the bargaining rights existing prior to the sale. Where geographic limitations have been placed upon such bargaining rights, this question is particularly critical as section 55 can only preserve existing bargaining rights, and not create new ones.

17. Our conclusion, after taking into account the above considerations, is that a sale of a business did not occur in this case. What we have here is, at most merely a transfer of work out of the bargaining unit which does not appear to be motivated by any anti-union animus. While we can appreciate the applicant's concern about the erosion of its work jurisdiction, it appears clear to us that the provisions of section 55 were not intended to deal with the kind of problems facing the applicant in this case.

18. Accordingly, this application is dismissed.

1402-78-R Canadian Union of Public Employees and its Local 115 and 2035, (Applicant), v. The Corporation of the City of Brockville, (Respondent).

Successor Status – Board issuing declaration on finding that merger of two unions substantially completed

BEFORE: Donald D. Carter, Chairman, and Board Members W. F. Rutherford and W. H. Wightman.

APPEARANCES: *Helen Browne, George Newell, Hector Woods and Floyd Brayton for the applicant; Robert W. Kitchen, Miles Brown and Douglas Ellis for the respondent.*

DECISION OF THE BOARD:

1. The name "City of Brockville" appearing in the style of cause of this application as the name of the respondent is amended to read: "The Corporation of the City of Brockville".
2. This is an application under section 54 of the *Labour Relations Act* seeking a declaration that Local 115 of the Canadian Union of Public Employees, by reason of a merger, has acquired the collective bargaining rights of Local 2035 of the Canadian Union of Public Employees. Local 115 represents the outside workers employed by the respondent employer and has enjoyed a collective bargaining relationship with the respondent for some time.
3. The inside workers employed by the respondent were organized less than three years ago, a certificate being issued to the Canadian Union of Public Employees for this group of employees in August, 1976. This bargaining unit of employees is now covered by a collective agreement that recognizes the Canadian Union of Public Employees and its Local 2035 as their sole and exclusive bargaining agent. It is the bargaining rights of this group of employees that is the subject of this application.
4. Hector Woods, the president of Local 2035, testified that, following a first-agreement strike by the inside workers, discussions about the possibility of a merger with the outside workers took place. A meeting was held in August, 1977, at which time a motion proposing a merger with Local 115 was approved by a secret ballot vote of those attending the meeting. The wishes of the membership were tested once more in December, 1977, and a motion favouring merger was passed again. The issue of a merger was then formally put to the membership on August 28, 1978, at which time it was approved unanimously by secret ballot vote. The motion put to the meeting on August 28th reads as follows:

WHEREAS, Local Union 2035 of the Canadian Union of Public Employees desires to be represented for the purposes of collective bargaining by Local 115 of the Canadian Union of Public Employees, and

WHEREAS, Local Union 2035 sought and obtained the approval to transfer its jurisdiction to Local 115 of the Canadian Union of Public Employees from the National Office, and

WHEREAS, It is intended to make a Collective Agreement in the name

of The Canadian Union of Public Employees and its Local (115) with the Corporation of the City of Brockville

THEREFORE BE IT RESOLVED, that Local 2035 C.U.P.E. shall surrender its Charter and become known as C.U.P.E. Local (115) subject to the Canadian Union of Public Employees' Constitution and By-laws.

PROVIDED, however, that Local 2035 may, and is hereby authorized to continue to use and be known by its present name and number until such time as a change to a new name and number has been agreed upon with the Employer with whom the new Local (115) undertakes to make a new Collective Agreement or until such change has been made in accordance with the procedures under Section 54 of the Ontario Labour Relations Act.

PASSED AND DATED AT Brockville THIS 28 DAY OF August, 1978.

SIGNED: "Hector Woods"
President Local

"Muriel E. Bissonnette"
Recording Secretary Local

"George H. Newell"
CUPE Representative

5. Much the same procedure was followed by Local 115. According to its president, Floyd Brayton, the matter of merger was first discussed by the outside workers in 1977, and was then approved by a vote of the membership in the latter part of that year. On August 29, 1978, a motion was put to the membership on the issue of merger, and received the unanimous approval of the membership present at that meeting. The wording of that motion is set out below:

WHEREAS, Local 2035 desires to be represented for the purposes of collective bargaining by Local 115 of the Canadian Union of Public Employees, and

WHEREAS, Local 2035 obtained the approval to transfer its jurisdiction to Local 115 of the Canadian Union of Public Employees from the National Office, and

WHEREAS, It is intended to make a Collective Agreement in the name of The Canadian Union of Public Employees and its Local (115) with the Corporation of the City of Brockville

THEREFORE BE IT RESOLVED, that Local 115 C.U.P.E. accept all members of Local 2035 into its membership.

PROVIDED, however, that Local 2035 may, and is hereby authorized to continue to use and be known by its present name and number until

such time as a change to a new name and number has been agreed upon with the Employer with whom the new Local (115) undertakes to make a new Collective Agreement or until such change has been made in accordance with the procedures under Section 54 of the Ontario Labour Relations Act.

PASSED AND DATED AT Brockville THIS 29 day OF August, 1978.

SIGNED: "Floyd Brayton"
President Local

"Cecil Fernyhough"
Recording Secretary Local

"George H. Newell"
CUPE Representative

6. Following the meetings of August 28th and 29th, George Newell, a national representative of the Canadian Union of Public Employees who was advising the two locals, submitted a request in writing to Kealey Cummings, National Secretary Treasurer of the parent union, for permission to transfer the jurisdiction of Local 2035 to Local 115. Cummings replied to Newell on October 3rd in the following terms:

This will acknowledge receipt of your correspondence of September 6th, accompanied by the resolutions dealing with the above noted matters.

Since it would appear that the requirements of Article 3.5 of the national constitution have been met in this regard, I am pleased to confirm that approval is hereby granted for the transfer of jurisdiction of Local 2035 into Local 115.

We have noted that the appropriate meetings were held August 28th and 29th, 1978, and to this effect, are considering August 29th, 1978 as the official date of the transfer of jurisdiction.

Please advise my office once approval has been granted by the Ontario Labour Relations Board in order that we may take the necessary action to remove Local 2035 from our records.

It is anticipated that in due course you will also confirm when Local 115 will be submitting per capita tax payments for both groups.

Trusting this will be found satisfactory, and looking forward to hearing from you, I remain ...

7. The constitution of the Canadian Union of Public Employees sets out certain procedures for a transfer of jurisdiction between locals. Articles 3.5 and 3.6 state:

3.5 A local union may transfer all or part of its jurisdiction to another local union, providing that the local union that is transferring its jurisdiction must call a special membership meeting of which notice has

been given to its members and at least a two-thirds majority of those in attendance must approve it by a Resolution. Providing furthermore that the local receiving the jurisdiction agrees to accept the transfer by a similar majority. When these procedures are completed and approved under seal by the National Office then the transfer of jurisdiction is completed.

3.6 The merging local unions must seek the approval of the membership at a special meeting of which due notice has been given. The merging resolutions must be passed by a two-thirds majority of those in attendance by all the local unions involved. On receipt of all documents pertaining to merger, the National Secretary-Treasurer may issue a new or amended charter to facilitate the merging of such local unions.

8. After the passing of the two resolutions in late August of 1978, and up to the date of this hearing, the two locals held their meetings together, but have kept the business affairs of the two locals separate. The two locals still have their own separate executives and bank account, and the members of the two locals still vote separately on their own business. Some time in October the members of the two locals further confirmed the merger by a show-of-hands vote. From the evidence, however, it was clear that it was still intended that the separation of business affairs would continue until the Board granted a declaration in this matter. An application for a declaration under section 54 was filed with the Board on November 20, 1978.

9. Counsel for the respondent submitted that in these circumstances the Board should not grant a declaration under section 54 of the Act. First of all, counsel argued that this was a situation where the applicants were seeking to obtain the approval of the merger before it had been completed. According to counsel, the fact that there had been no merger of the executives of the two locals, and no consolidation of their bank accounts, meant that the merger had not been completed. Counsel, moreover, pointed out that it had not been established that the procedures were approved under seal as required by the CUPE constitution. A second argument raised by counsel for the respondent was that the Board's certificate had vested bargaining rights in the parent union, and not Local 2035, and there was no evidence of a transfer of bargaining rights from CUPE to Local 115. Underlying these arguments was a concern on the part of the respondent that the merger might give rise to bargaining problems if the inside and outside workers were to negotiate jointly.

10. The question of whether a merger, amalgamation, or a transfer of jurisdiction has been completed must be determined by reference to the facts of each case. Previous decisions indicate that there need only be substantial completion of the transaction in order to obtain a declaration from the Board under section 54. As the Board stated in *Hydro-Electric Commission of the City of Hamilton* (1962), 63 CLLC, ¶16,261,

The practice of the Board has been to inquire whether the predecessor trade union has exhibited the desire and has taken the necessary steps to effect the merger, amalgamation or transfer of jurisdiction. The Board must also be satisfied that a majority of the employees in the bargaining unit concerned have given their approval to the action of

the predecessor trade union. The successor trade union must also have exhibited a desire and taken the necessary steps to merge or amalgamate with or accept the transfer of jurisdiction over the bargaining unit.

The Board must be satisfied that the parties have substantially met these requirements and that the employees concerned are not opposed to the merger, amalgamation or transfer of jurisdiction.

11. The Board's concern when administering section 54 is that both the predecessor and successor trade union have given a clear approval to the proposed transaction, and that it has also been approved by the employees concerned. Once these matters of substance have been established, then a declaration may issue under section 54 even though certain mechanics of the transaction still remain to be done. This approach, in our view, is not inconsistent with the Board's decisions in *Consolidated Glass Industries Ltd.* (1961), 62 CLLC, ¶16,220, and *Board of Education for the Borough of North York*, [1970] OLRB Rep. Feb. 1776. In *Consolidated Glass Industries Ltd.*, there was a specific finding that the successor union had not asserted "any claim to any degree of control" over the predecessor union by the time of the application, indicating that the transaction had not received the clear approval of the successor union and its members. The facts before the Board in *Board of Education for the Borough of North York* were somewhat different in that the approvals were conditional upon the establishment of a separate local for the employees represented by the predecessor union and, as this condition had not been completed, the Board held the application to be premature. A common feature of both cases, however, is that the transaction in question fell short of being substantially completed.

12. The facts in the instant case do not point to the same conclusion. It is quite evident that approvals have been given by both the predecessor and successor union and the members of these two unions. While these approvals might be construed as being conditional upon an application being made under section 54 of the Act, it is quite clear that this condition has been met with the filing of the application. The fact that in this case a separation of business affairs has been maintained does not mean that the merger has not been substantially completed. It is quite clear in this case that what was left undone was of a mechanical nature, and that for all intents and purposes the merger was completed. For the Board to delay making a declaration until these mechanics were completed would introduce an element of unnecessary formality into the exercise of its jurisdiction under section 54.

13. The Board's conclusions that the merger was substantially completed does not dispose of this application completely. Counsel for the respondent also argued that Local 2035 had no collective bargaining rights to bring to the merger. In the Board's view, the facts do not support this submission. While the Board's certificate may have been issued in the name of the Canadian Union of Public Employees, it appears clear that Local 2035 has acquired bargaining rights by operation of the recognition clause of the collective agreement. Even if it could be argued that in these circumstances the parent union still retained some residual claim to bargaining rights, it is quite evident that it too has given its full approval to the merger of those bargaining rights in Local 115.

14. The Board, therefore, declares that Local 115 of the Canadian Union of Public Employees has acquired as of August 29, 1978, all the rights, privileges and duties under the *Labour Relations Act* of the Canadian Union of Public Employees and its Local 2035 in respect of those employees described in this application.

1567-78-R United Steelworkers of America, (Applicant), v. **Cleveland-Cae Metal Abrasive Limited**, (Respondent), Helen Wernham plus two (2) other employees, (Intervenors).

Certification – Representation Vote – Discussion of Board discretion to order representation vote

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members D. B. Archer and C. G. Bourne.

APPEARANCES: *Lorne Ingle and Alex Sharpe for the applicant; F. R. von Veh, Bruce Pollock and Robert Fuller for the respondent; Helen Wernham for the intervenors.*

DECISION OF THE BOARD; February 1, 1979

1. The name “Cleveland-CAE Metal Abrasive Limited” appearing in the style of cause of this application as the name of the respondent is amended to read: “Cleveland-Cae Metal Abrasive Limited.”
2. This is an application for certification.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.
4. In a decision dated January 4, 1979 the Board found that all office, clerical and technical employees of the respondent at Welland, save and except supervisors, persons above the rank of supervisor, secretary to the general manager and employees now covered by a collective agreement constituted a unit of employees of the respondent appropriate for collective bargaining.
5. Mr. G. Brooks was terminated by the respondent company on December 12, 1978. Mr. Brooks reported for work on that day and was informed that his services would no longer be required. A question arose at the hearing as to whether Mr. Brooks should be considered an employee for purposes of this application. The date of application in this matter is December 12, 1978 and accordingly, the Board finds that Mr. Brooks was an employee as of the date of the application and is, therefore, an employee for purposes of the application. The union has filed a section 79 complaint in respect of the termination of Mr. Brooks.
6. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on January 16, 1979, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.
7. Counsel for the respondent argued that the Board should exercise its discretion under section 7(2) of the Act and direct the taking of a representation vote. In support of his position, counsel argues that there is a split between the three bargaining unit employees

who work in the office and the four technicians, as evidenced by the statement of desire submitted by the office employees, which should be resolved by a vote. He argues further that if it were not for the membership card of a person who is no longer an employee (Mr. Brooks) the Board would not be permitted to certify without a vote because the union would have only fifty per cent support (i.e. membership evidence submitted on behalf of only 3 of the 6 bargaining unit employees). Counsel argues that in the circumstances the Board should not certify without a vote.

8. The certification procedure demands that the number of employees in the bargaining unit be determined as of a stipulated date so as to provide a fixed point of departure and to minimize the possibility of gerry-mandering. The date chosen by the Board for this purpose is the date of application. Mr. Brooks was an employee as of that date and the Board is satisfied that the union enjoys the support of 4 of the 7 employees falling within the bargaining unit as of the date of application. Furthermore, none of the three employees who signed the statement of desire in opposition to the union also signed membership documents in support of the union as might cause the Board to exercise its discretion in favour of a vote. The majority principle is a cornerstone of the labour relations system which operates in this jurisdiction. The Board confers bargaining rights covering all of the employees in a bargaining unit found appropriate for collective bargaining when satisfied that the applicant trade union represents a majority of the employees. Having regard to the principle of majoritarianism as rooted in the Act, it is the practice of the Board to certify without a vote when satisfied that membership evidence within the meaning of the Act has been submitted on behalf of more than fifty-five per cent of the employees in the unit. In this case the Board is satisfied that membership evidence has been submitted on behalf of more than fifty-five per cent of the employees in the appropriate bargaining unit as of the date of application. There is nothing before the Board in this case as would cause it to depart from its normal practice and accordingly, the Board hereby certifies the applicant as bargaining agent for the employees in the bargaining unit described in paragraph 4 herein.

9. A certificate will issue to the applicant.

1439-78-R 1447-78-R United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46, (Applicant), v. **English & Mould Ltd.** and Argus Refrigeration & Air-Conditioning Limited, (Respondents).

Related Employer – Related companies performing similar work under common control and direction – Companies operating in “double breasted” fashion with one competing for nonunion work – Non union company found to be expanding in I.C.I. Sector and eroding established bargaining rights – 1(4) declaration issued

BEFORE: E. Norris Davis, Vice-Chairman and Board Members J. D. Bell and W. F. Rutherford.

APPEARANCES: *L. C. Arnold and W. Howard for the applicant; R. D. Perkins for the respondent.*

DECISION OF E. NORRIS DAVIS, VICE-CHAIRMAN, AND BOARD MEMBER W. F. RUTHERFORD; February 9, 1979

1. The Board directs that the above applications be and the same are hereby consolidated.
2. These are applications in which the applicant alleges that there has been a sale of a business under Section 55 of the Act by English & Mould Ltd., hereinafter referred to as “E & M” to Argus Refrigeration and Air-Conditioning Limited, hereinafter referred to as “Argus”, or alternatively, that E & M and Argus are corporations under common control or direction and carrying on associated or related activities or businesses within the provisions of section 1(4) of the Act.
3. The respondents deny any sale of a business. The respondents concede that the operations of Argus are controlled by the officers and directors of E & M and take the position that in the total circumstances the Board should not exercise its discretion under section 1(4) by making a declaration that the two respondents constitute a single employer for the purposes of the Act.
4. Argus was incorporated on December 13, 1965 and engaged in the commercial refrigeration and service business. E & M had no ownership or business relationship with Argus until May 26, 1970 at which time all of the shares of Argus were acquired by E & M. The business of Argus continued to be operated with Mr. Donald Key, a Vice-President of E & M, becoming President of Argus and controlling the day to day operations. At the time of the Argus acquisition, E & M itself was not directly engaged in refrigeration work and the acquisition would permit participation in this field through Argus; also, E & M was not then in the maintenance and service of industrial buildings which it was intended could be expanded by Argus.
5. Key testified that following May 26, 1970 Argus continued in its established business and expanded its maintenance business through a staff of refrigeration mechanics and installers covered under a collective agreement with Local 787 Refrigeration Workers of

Ontario. All normal office functions were and are performed by E & M employees including employees estimating on jobs. There is common telephone service answered in the names of both businesses. Argus occupies a building owned by E & M and utilizes any available equipment of E & M by withdrawing it from the E & M storeroom. Building rental, equipment rental related to usage, and cost of employee services are charged to Argus through an arbitrary inter-company lump sum assessment. Argus banking, at the time of acquisition, was done in a bank different than that used by E & M but was subsequently transferred to the same bank, retaining separate accounts and different signing officers. The sign on the building occupied by Argus indicates it to be a subsidiary of E & M as does the signs on trucks.

6. In late 1971 Argus acquired for the first time a licence to engage in the plumbing and heating field and employed a plumber for that purpose. Trucks bearing the Argus corporate name and identified as a subsidiary of E & M are parked in the E & M yard. The trucks indicate Argus to be in refrigeration and air-conditioning and plumbing and heating service business and display Argus plumbing and heating licence number, all of which is similarly reflected in its yellow page advertising. The trucks are used only for service calls on air-conditioning and refrigeration and not for mechanical work. There is one truck which is signed "Electrical Division" although Argus has not employed an electrician since 1974.

7. In 1972 Argus expanded into the residential air-conditioning field but this business dried up in late 1974 resulting in Argus notifying Local 787 in early 1975 that it wished to terminate its collective agreement as it was withdrawing from the air-conditioning business. Also in 1972 as the residential business was highly seasonal, Argus looked to the industrial field such as small factories, warehouses and Federal and Provincial Government contracts where it was stated there were jobs involving a predominance of contractors not operating under a union contract. In the period 1973 – 1976 Argus was actively endeavouring to break into the plumbing and heating field of the I.C.I. construction sector with few of its bids being accepted: of a total gross business of \$300,000 – \$500,000 during that period only \$11,000 to \$32,000 in a year was attributable to its plumbing and heating endeavours.

8. This lack of success in bidding on I.C.I. jobs was attributed by Key to the fact that Argus was bidding as a subcontractor and not as a prime contractor. Consequently in 1977 Argus embarked on a practice of bidding as a general contractor with such work as did not fall within their own resources being sub-contracted out. Starting in June 1977 and through 1978, Argus was successful in acquiring 13 jobs, 9 of which were taken as prime or general contractor. According to Key, bidding on these jobs was done by both union and non-union contractors although the latter predominated and the pressure of non-union contractors would in itself result in E & M not attempting to bid on those jobs.

9. Mr. William Howard, Business Manager for Local 46, testified that on a recent job at the Ontario Provincial Police Headquarters, Argus was the low bidder over five other bidders, all of which latter held collective agreements with Local 46 or its sister Local 53. Key states that in this instance Argus merely carried the price of a Pat Quinn who holds a collective agreement with Local 787 and that Quinn was named in the Argus tender and actually did the work on the job. Argus' role was strictly that of prime contractor and will not directly do any work on that job.

10. Argus has employed a maximum of four persons at any given time and currently has in its employ 3 persons, viz John Pratt, a plumber employed since June 5, 1978, Peter Scrivner, an apprentice employed since June 8, 1978 and William Hamilton, a steamfitter, employed since September 15, 1978.

11. Mr. Donald Kirk, President of E & M, is also a Vice-President of Argus. He testified that E & M has held a collective agreement with Local 46 many years before the Argus acquisition. E & M is engaged in mechanical work, plumbing and heating and sheetmetal and employs not less than 20 plumbers and fitters. E & M has a division for "large contracts" (those in excess of \$100,000 and ranging up to \$4,000,000) and one for "small contracts" (those below \$100,000). The small contract work is, in the main, related to previous large jobs done although jobs are also done for firms with whom there has not been a previous connection.

12. Kirk states that, in accordance with long standing policy, E & M does not bid on any job where it is known to have a non-union contractor and that such work would be bid by Argus. Further, E & M has never sub-contracted any work to Argus. There have been a number of isolated cases where E & M employees have worked on Argus projects for short periods of 2 – 3 days to a week and under such circumstances the E & M employees remained in the E & M payroll and received their regular pay rates etc. and all costs were charged to Argus.

13. E & M is a member of the Mechanical Contractors Association of Ontario and as such is bound to the collective agreement between that Association and the Ontario Pipe Trades Council of the United Association of journeymen and apprentices of the plumbing and pipefitting industry, of which Council, Local 46 is a member. The collective agreement became effective June 15, 1978 and runs through to April 30, 1980 and covers mechanical work done in the industrial, commercial and institutional sector of the construction industry.

14. Howard, Business Manager of Local 46, testified that he first learned that Argus was moving into the I.C.I. plumbing and heating field in January 1978 when the matter was drawn to his attention by members of the Mechanical Contractors Association. Howard stated that up to that time he considered Argus to be in the air-conditioning and refrigeration business and that he only learned through these hearings that Argus no longer had a collective agreement with Local 787.

15. Howard, as a result of the contractors' complaints, assigned a Business Agent, Brice Sned, to determine whether Argus was employing members of Local 46 on a job at the Whitney Block. Sned, on three occasions over the course of a week, made enquiries and investigations at this location without finding any Argus employees on site. Two other Business Agents were assigned to investigate projects at the Ontario Science Centre and at Downsview with similar results.

16. Howard then phoned Kirk, President of E & M, in February 1978 and enquired when "he had gone into the plumbing and heating business with Argus" and on being informed by Kirk that "we have to compete and they are only bidding on non-union jobs", he informed Kirk "we'd have to grieve." Subsequent to this call Kirk testified he received a call from the Mechanical Contractors Association stating the union was complaining about the

matter. Kirk then sought advice of Counsel who advised there was no contract violation involved in what was being done.

17. Kirk also testified that in February two union representatives took pictures of the E & M-Argus location and when confronted by Kirk as to what was their purpose he received no direct response. Kirk invited them to look around the shop and office and to come in and talk which invitations were refused.

18. According to Howard they decided to wait until a job was actually in process to make further investigation. As a consequence, it was in June 1978 that Howard and Sned twice visited the Postal Station G project. On a June 12th visit to the site Howard & Sned found material on the site together with the shipping bills to Argus from the supplier, noted the project job number but could not determine the presence of any person on the job other than the site foreman. At this time an E & M truck was delivering acetylene bottles. They returned the following day, June 13, 1978 at which time they found two men on site operating a threading machine, normally within Local 46 jurisdiction. There was present on the site a scissor lift with E & M's name on it, and Pratt was then removing the existing system. Sned ascertained from a timebook on the site, bearing E & M's name, that the names of the two persons on the job were Pratt and Scrivner. Sned asked and received an affirmative reply from Pratt that he was employed by Argus.

19. In the course of the discussion between Howard, Sned and the two Argus employees, Howard indicated that he asked, "how would you like to be members of Local 46?" and they indicated no interest. Howard, in giving evidence, also said it was his view that in any event Local 46 had a contract binding E & M to hire Local 46 members. Pratt and Scrivner who gave testimony stated that Howard and Sned did not disclose their Local 46 identity and that the conversation centred on the Argus volume of work and future prospects. Pratt also stated that on another occasion he was approached by an unidentified individual who asked why he didn't approach the union and that he should go to Local 46.

20. Sned again visited the site on June 30th on Howard's instructions in order to verify that the installation work was being done by Argus. At that time he observed Pratt and Scrivner doing the installing, using the scissor's jack and cutting and threading pile.

21. On July 4th, Local 46 filed a grievance against E & M with the Mechanical Contractors Association alleging a violation of the collective agreement by E & M founded on the above incidents and alleging,

"The above noted contractor has sub-contracted work to a subsidiary firm of Argus Refrigeration & Air-Conditioning Ltd. contrary to the terms of the collective agreement. Further, he has in his employ non-union workmen performing the work contrary to the collective agreement."

Hearing of this grievance by the Joint Board was ultimately done on September 11, 1978, having been subjected to several postponements in the interim. According to minutes filed with the Board the matter was disposed of in the following terms:

"The joint Conference Board could not come to a decision due to the

fact that the nature and contents of the grievance by Local Union 46 related to an interpretation of the Labour Relations Act. The union's claim that English & Mould Ltd., Argus Refrigeration and Air Conditioning Ltd., are one and the same for purposes of the collective agreement cannot be answered by this Board."

Counsel for the applicant, by letter of November 20, 1978 to all interested parties, gave notice of the referral of the grievance under Section 112a of the Act, and by way of clarifying its position, noted that it was alleging a violation of Article 34.2 of the Agreement in addition to Articles 11 and 21. Article 34.2 reads:

"It is understood that this Agreement shall apply to all firms or companies engaged in the specific character of work covered by this agreement, which may be or hereafter are incorporated by any member of the Association and which are owned or controlled directly or indirectly by them."

22. It is conceded by the respondents that E & M and Argus operate under common control or direction. The shared use of office and technical staff and of available equipment and some services indicate a high degree of integration of operations in related businesses. There is no dispute but that the type of work performed by Argus is completely similar to work performed by E & M and that complementary policy decisions have been made that E & M would not bid on jobs where it was known that non-union contractors were bidding because of non-competitiveness and that the *raison d'être* for Argus is to have a vehicle by which to compete in such cases.

23. Argus, through the period of late 1973 to June, 1977, did 7 plumbing and heating jobs all of which were below \$14,000 in value except for one which was for \$32,000 and which had a total value of approximately \$82,000. Its employment of plumbers for these jobs totalled one for the period October 19, 1973 to August 14, 1974 and one from October 28, 1975 to June 29, 1976.

24. Starting In June, 1977, Argus was establishing a presence in the field. From June, 1977 and through until August, 1978 Argus acquired 14 plumbing and heating jobs totalling \$942,633 in value and one of which contracts was for \$196,000. Its employment of plumbers over this period has ranged between 2 and 4.

25. Prior to June, 1977 Argus may be considered to have been exploring the market into which it made 2 or 3 entries but by June, 1977 it must be considered to be firmly engaged in that market. The applicant states that it was not aware of Argus' activities until January, 1978 and the Board does not draw an inference that by normal diligence it should have been aware prior to that time having regard to the fact that Argus up to September 28, 1977 had only one plumber in its employ at any given time and that despite the acquisition of a plumbing and heating licence in 1971 Argus had no person in its employ as a plumber during all of 1972 and up to October 19, 1973, and that there was a 14 month period between August 14, 1974 and October 28, 1975 and a 15 month period between June 29, 1976 and September 28, 1977 when it had no plumbers in its employ.

26. The purpose of Section 1(4) of the Act, as has been dealt with by the Board in

many decisions and comprehensively in the case of *Industrial Mine Installations Limited*, [1972] OLRB Rep. October 1029, is to preclude the erosion of existing bargaining rights by activities of a related employer. There is no evidence of a diminution of employment or business volume at E & M since the entry into the same field of Argus. That fact, in itself, is not determinative of whether the Argus activities are erosive of the applicant's bargaining rights but rather, the Board must look to whether work being done by Argus is work which would otherwise fall within the scope of the collective agreement between the applicant and E & M, namely "mechanical work in the industrial, commercial and institutional sector of the construction industry" and on this basis the activities of Argus must be considered as capable of undermining the existing bargaining rights.

27. Article 34.2 of the collective agreement is a recognition by the parties that work performed in the I.C.I. sector through "firms or companies" incorporated by a contractor and owned or controlled directly or indirectly is brought within the operation of the Agreement. Counsel for the respondents argues that Argus is not a company incorporated by E & M and that Article 34.2 is inapplicable for that reason. The evidence is that Argus was brought into corporate existence by persons wholly disconnected from E & M or any of its officers or directors and the respondents have an arguable point. Nonetheless, the policy decision made that Argus would seek work in the I.C.I. sector on the basis of not being bound by the terms of the collective agreement which were binding on E & M must be considered as undermining of Local 46's bargaining rights.

28. The evidence is that when the applicant became aware in January, 1978 of Argus' activities in the I.C.I. sector complaints were made both to E & M and to the Mechanical Contractors Association and Kirk was put on notice by Howard that the union "would have to grieve." From that time until the formal grievance was filed on July 4, 1978 the applicant took several steps in the collection of evidence which in its opinion would support the grievance. This demonstrates a clear and timely intention by the applicant not to leave the bargaining rights exposed.

29. The Board is of the opinion that E & M and Argus are carrying on associated or related activities or businesses under common control or direction and constitute one employer for the purposes of the Ontario Labour Relations Act, and the Board so declares; and such declaration shall be effective in respect of all future contracts acquired by Argus Refrigeration and Air-Conditioning Limited for mechanical work in the industrial, commercial or institutional sector of the construction industry in the geographic area covered by collective agreement between the applicant and English and Mould Ltd.

30. As a result of the Board's disposition of this matter under section 1(4) of the Act, it becomes unnecessary to consider the application made under section 55 of the Act and that application is accordingly dismissed.

DECISION OF BOARD MEMBER J. D. BELL:

1. I disagree with the decision of the majority of the Board to declare that E & M and Argus constitute a single employer for purposes of The Ontario Labour Relations Act.

2. The power given to the Board to treat two companies as constituting one employer is a discretionary power. The particular circumstances of each case should be carefully weighed before the discretion is exercised.

3. The majority, in paragraph 22 of the decision, have summarized some of the common elements of the two companies. However other factors are equally, if not more important to arriving at a decision. In my opinion two of the most important are:

Is the applicant attempting to obtain by this application bargaining rights which it has been unable to obtain through normal circumstances?

Are the bargaining rights of the union at E & M being undermined by Argus doing work that would normally be done by E & M.?

4. The evidence of Howard, Business Manager of Local 46 is that two of the employees of Argus, Pratt and Scrivner, declined to join the union when he asked them if they would like to be members.

5. The evidence of Kirk, President of E & M is that the business of E & M was steadily growing and was not adversely affected by the existence of Argus but was complemented. Nor was there any evidence that the employee member of Local 46 at E & M had in any way been adversely affected. Howard's evidence is that the initial complaint against Argus was made to him by Argus competitors not by members of his union.

6. These important factors make it clear to me that I should not find E & M and Argus are one employer for purposes of The Labour Relations Act but they are parallel businesses. Accordingly I would dismiss this application.

1165-78-R Teamsters Local 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, (Applicant), v. **Greb Industries Limited**, (Respondent), v. Group of Employees, (Objectors).

Charges – Representation Vote – S-79 – Employer statement circulated prior to representation vote – No breach of Act arising from statement – No improper interference with vote

BEFORE: R. A. Furness, Vice-Chairman, and Board Members W. Gibson and B. Lee.

DECISION OF R. A. FURNESS, VICE-CHAIRMAN, AND BOARD MEMBER W. GIBSON; February 20, 1978

1. The Board in a decision dated October 31, 1978, directed the taking of a representation vote in this application for certification. The representation vote was conducted on November 14, 1978. The Registrar directed all interested persons to refrain and desist from propaganda and electioneering from midnight of Friday, November 10, 1978, until the vote was taken. Not more than fifty per cent of the ballots cast were cast in favour of the applicant.

2. In a letter dated November 16, 1978, the applicant stated:

On November 14, 1978 a representation vote was held as directed by the Board in a decision dated the 31st of October, 1978. The applicant is now in possession of a number of letters prepared by a representative of the Respondent and distributed to all employees in the unit. It is the applicant's view that the conduct of the employer prior to the vote constitutes a violation of Sections 56 and 61 of the Labour Relations Act. As a result of this conduct on the part of the employer, the representation vote did not reveal the true wishes of the employees. The particulars of misconduct are set out below:

1. On or about November 7, 1978, a letter was prepared by the employer and copies were distributed to all the employees in the unit.
2. On or about November 8, 1978, a letter was prepared by the employer and copies were distributed to all employees in the unit.
3. On or about November 10, 1978, a letter was prepared by the employer and copies were distributed to all employees in the unit.
4. Each of the letters referred to above were prepared on the employer's letterhead and signed by Mr. Stanley B. Frieze, Chairman of the Board.
5. The letters referred to above were delivered to the homes of the employees by the security guards in the employ of the Respondent.
6. It is the position of the applicant that the contents of the letters referred to above as well as the manner in which the letters were distributed constitute a violation of Sections 56 and 61 of the Labour Relations Act. Due to the conduct of the Respondent as referred to above, the true wishes of the employees were not revealed.

The applicant requests that a hearing be scheduled in order that it might call evidence and present argument in relation to the allegations cited above. The applicant will request from the Board an order directing another representation vote in order that the true wishes of the employees can be ascertained.

3. It is not the contention of the applicant that the respondent had violated the silent period referred to in paragraph one. The three letters which form the substance of the applicant's position are now set forth. Each letter appears on the respondent's stationery and each letter is signed by "Stanley Frieze, Chairman of The Board". The portions of these letters which appear in italics have been underlined in the original texts by the author of the letters. The portions of these letters which have been underlined have been so emphasized by the Board because these are the passages which the applicant relies on in support of its position. The letters read as follows:

November 7, 1978

By now I am sure that you are aware of the application made by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 879 Union seeking to become your exclusive bargaining agent in all matters relating to your wages and working conditions.

You may have wondered why we have not communicated with you before this time in terms of the application and our position. We delayed in writing to you until the proposed bargaining unit had been defined. That position was clarified at a meeting held in Toronto on October 30th. The composition of an appropriate bargaining unit and the identity of those eligible to vote was settled by an officer of the Ontario Labour Relations Board. As a result, your name has been placed on the voting list.

At the same time, arrangements for a secret ballot vote were agreed upon and a vote will be conducted on Tuesday, November 14th, 1978.

The vote will be conducted on Company premises during working hours by a representative of the Ontario Labour Relations Board. It is a secret ballot vote and no one will know how you vote. You may vote for or against the Union whether or not you are a Union member and whether or not you have signed a card at any time in support of the application.

You should be aware that you will be directly affected by the outcome of the vote. If the Union becomes certified as your bargaining agent, it will represent *all* employees in the bargaining unit and not just those employees who are Union members. Of more significance is the fact that the Union will be certified if it obtains more than 50% support of those employees *actually casting ballots* on November 4th. *If you do not participate and exercise your right to vote*, the outcome could be determined by a small minority of employees.

The Ontario Labour Relations Act imposes restrictions on a Company in regard to open discussions as to the merits of trade union representation and specifically prohibits the Company from making "promises". Those restrictions do not equally apply to trade unions and we merely wish you to understand that any hesitancy on our part to discuss these matters with you have not been due to any lack of interest in you, on our part.

Yours sincerely,

November 8, 1978

Over the past few days I have written to you about the following vote to be held on November 14th.

I have attempted to briefly outline the circumstances leading up to this vote and put forward certain facts for your consideration. It is important that you are aware of as many facts as possible, within the limits of our ability to communicate prior to casting a ballot in this matter. You may wish to consider the following questions in light of the decision you have to make on November 14th.

- Who is the Union and who are its representatives. How much do they really know about you and your working conditions in the footwear industry? Whether you are represented by the Teamsters or not, you must remember that your wages and benefits must be competitive in the footwear industry and cannot be compared to the transportation industry.
- What agreements has the Union negotiated for comparable employees in the footwear industry which provide, without interruption of work, better benefits, salaries and working conditions?
- *What do the Union Constitution and By-Laws say about your obligations to pay dues, assessments and fines and how many these financial obligations be changed?*
- *What are these monies used for?*
- *What other obligations arise from membership in the Union and what disciplinary procedures are set out in regard to violation of provisions of either the Constitution or By-Laws?*

Answers to these and other questions are important in deciding whether or not you wish to assume the obligations and responsibilities that go with Union membership and representation. *We suggest that you obtain a copy of the Constitution and By-Laws and obtain answers to these questions before committing yourself at the ballot box.*

In closing, we repeat that those of you legally included in the unit are directly affected by the result of the vote. That is, if the Union is certified, then by law it represents all employees in the bargaining unit and not just those who have signed authorization cards or who support the Union. The Union will be certified if it obtains a bare majority of those employees who actually cast ballots on November 14th. *You must, therefore, exercise your right to vote* so that the final determination in this matter will be based on the views of a majority of employees.

Yours sincerely,

DELIVERED BY HAND

November 10, 1978

In earlier letters, I have attempted to put forward some facts for your consideration and underline the importance of voting on November 14th. At this time, I would like to set out some further views.

It is my hope that within the available time you will be in a position to consider "both sides of the coin" before making a final decision for or against collective representation by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 879.

You are now aware that union organizers can and sometimes do make promises, regardless of whether or not they have any realistic hope of fulfilling these promises. Issues of job security and wage increases are often high on the list of a union organizer. The Company, on the other hand, is not free to make promises during this period. The matter of job security is, of course, the prime importance to both you and the Company. It cannot be guaranteed through promises or provisions in a Collective Agreement. Your security and the Company's well-being depends upon your efforts and the Company's ability to remain competitive in the market place.

In regard to benefits, I am sure that you are aware that your fringe benefits (i.e. Life Insurance, Major Medical and OHIP) are, as has always been our policy, identical to those negotiated for our manufacturing plants with the United Shoe Workers of America. Aside from these benefits, you are aware of our Job Progression/Job Posting Policy (in response to your wishes) of advancing employees from the various warehouses to management positions in both Greb and Bauer Marketing, and in Manufacturing. In spite of our heavy monetary losses in the past 2 years, as you are aware, wages were adjusted to the maximum that the Company could afford.

You may think that negotiations are a mere formality, resulting in improvements promised by the Union plus a guarantee of all existing working conditions. This is not correct. It is true, that following an application for certification and, where a union has been certified and given notice to bargain, an employer may not unilaterally "alter the rates of wages or any other term or condition of employment or any right, privilege or duty" until either a collective agreement has been signed or the rights to strike occurs.

(Incidentally, this restriction applies to improvements as well as curtailments). It should be made clear, however, that any settlement finalizing terms and conditions of employment in a Collective Agreement is a product of negotiations and mutual agreement between the Company and the Union which may take place over a period of months following certification.

Although I am new on the scene, I am well aware of the tremendous problems that have faced this Company in the past 2 years. Difficult and agonizing decisions at Greb and in the total footwear industry have had to be made because of the decline in our total economy. As you will note in An-

dre Morissette's letter of October 31, 1978, a copy of which was posted on your bulletin board, CEMP and myself are committed to turning this Company around and I will be looking for suggestions as to ways and means of improving our operations along with your total commitment.

In closing, I repeat that those of you in the defined bargaining unit are directly affected by the result of the vote. That is, if the Union is certified then by law, it must represent all employees in the bargaining unit and not just those who are members or who have supported the Union. The Union will be certified if it *obtains a bare majority of those employees who actually cast ballots* on November 14th. You must, therefore, exercise your right to vote so that the final determination in this matter will be based on the views of a majority of employees.

Yours sincerely,

4. These three letters were delivered to the employees' homes during the week prior to the representation vote by its office and secretarial personnel (not by its security guards). It is the respondent's position that this was done because of the disruption in the postal service. No exception is taken by the applicant to the method of delivery. In addition, the applicant does not object to the letter dated November 7, 1978. The applicant objects to one aspect of the letter dated November 8, 1978, and to several aspects of the letter dated November 10, 1978.

5. It is the applicant's position that the portions of the letters which have been underlined by the Board constitute undue influence on the part of the respondent and the results of the representation vote are not indicative of the wishes of the employees. In the applicant's view a new representation vote should be conducted so that the true wishes of the employees may be determined. The applicant enunciated the following propositions in connection with its argument that the respondent had violated sections 56 and 61: (i) consider all the circumstances, (ii), the test to be applied is an objective one and (iii), the timing of the statements. In conjunction with its analysis of the three letters the applicant referred to the *Bell & Howell Canada Ltd.* case, [1968] OLRB Rep. Oct. 695, and to the *Bush Gamble Company Limited* case, [1972] OLRB Rep. June 644.

6. The applicant argued that while the respondent was entitled to make comments on how the applicant affects its operations, it was not appropriate for the respondent to make comments regarding the applicant's internal operations. The applicant contended that the respondent had made comments about its internal operation in the letter dated November 8, 1978. The applicant interpreted the relevant passages in this letter as focusing on fines, financial obligations, disciplinary procedures. It was the applicant's view that the question "What are these monies used for?" implicitly means that the monies are not properly spent and focuses the issue away from the vote to another issue. The applicant argued that implicit questions amount to undue influence and suggest impropriety and very likely influenced the employees when they voted. The applicant stated that it had not had time to respond to the letter of November 8, 1978, and expressed the view that if the applicant had been able to respond the Board would not have been concerned.

7. The applicant reviewed the letter dated November 10, 1978, and characterized

the third paragraph as an allegation about how organizers of trade unions operate. It was the applicant's position that when an employer talks about security it is treading on dangerous ground. The respondent's remarks about security were viewed by the applicant as carrying an implication that if the applicant is certified their security may be seriously affected because the respondent would not be as competitive in the market place. The applicant characterized this as a subtle threat and as constituting undue influence. The applicant referred to the quotation from section 70 in paragraph five of the letter as misleading and once again pointed out that the applicant might have been able to deal with this point if it had had time. Paragraph six was interpreted by the applicant as support without a trade union on the scene. The applicant posed the question of how far may an employer venture before it crosses the line before it violates sections 56 and 61. In summing up the applicant described the alleged violations as subtle rather than blatant but insisted that such alleged violations affected the employees in the bargaining unit.

8. The respondent argued that it is the obligation of the Board to consider all the surrounding circumstances and not to isolate one sentence or one paragraph from the conduct of the parties. The respondent stressed the absence of allegations of promises, the absence of a captive audience, the absence of any statement or position that the respondent is not in favour of the applicant. The respondent emphasized that it had not asked its employees to vote against the applicant and insisted that it could have gone much further than it did if it wished to conduct a campaign against the applicant. The respondent characterized the letters as an attempt to persuade everyone in the bargaining unit to vote and viewed the letters as containing little or no emphasis on persuading the employees to change their minds or vote against the applicant.

9. The respondent characterized the letter dated November 7, 1978, as a communication emphasizing who was eligible to cast ballots in a secret representation vote and as an exhortation to all eligible employees to cast ballots in the representation vote. The respondent also characterized the letter dated November 8, 1978, as a further exhortation to all eligible employees to cast ballots in the representation vote together with a consideration of certain questions. The respondent emphasized that there was nothing in this letter which required the applicant to answer anything unless it received questions from employees. With reference to the letter dated November 10, 1978, the respondent disputed any contention that as soon as it talks about job security it is on dangerous ground. The respondent analysed this letter as not containing any implication either that any kind of retribution was to be executed by way of layoff or that success by the applicant would affect job security. It was the respondent's contention that everyone is aware of the difficulties of the footwear industry and the decline in the total economy. The respondent conceded that perhaps it should have quoted all of the section 70(1) but pointed out that this is only a statement of fact. The respondent viewed this letter in its entirety as not being tied in with the applicant either implicitly or explicitly. The respondent referred to its collective bargaining relationship with respect to its warehouse employees and extrapolated knowledge of this relationship to the employees affected by this application. It was the respondent's contention that its employees would know that the respondent would not react and discharge everyone. The respondent described the employees affected by this relationship as sophisticated and argued that the three letters should be viewed in this light. The respondent concluded by stating that it would be impossible to draw any conclusion that it had exercised under influence or threatened its employees who are affected by this application.

10. Section 56 of The Labour Relations Act states:

No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, *but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.*

(Emphasis added).

Section 61 of The Labour Relations Act states:

No person, trade union or employers' organization shall seek *by intimidation or coercion to compel* any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

(Emphasis added).

It is necessary for the Board to determine whether the respondent in expressing its views has used coercion, intimidation, threats, promises or undue influence and whether it has violated section 61.

11. In the *Pigott Motors (1961) Limited* case, 63 CLLC ¶16,264, at p. 1130, the Board expressed its views on the sensitive nature of the relationship which exists between an employer and its employees as follows:

In view of the responsive nature of his relationship with his employer, and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act.

Having regard to the sensitive nature of the relationship between an employer and its employees, the conduct of an employer in expressing its views (commonly referred to as exercising its right to freedom of speech) cannot be judged merely by any unqualified reference to freedom of speech. The permissible limits of an employer's claim to set forth its views (bearing in mind the limitations imposed under section 56) on the one hand and the immunity of employees from interference and influence by that employer on the other hand requires an assessment of these two factors.

In the *Hayes Steel Products Limited* case, [1964] OLRB Rep. April 30, the Board at page 31 referred to the remarks of Learned Hand, C.J. in *N.L.R.B. v. The Fedderbush Co. Inc.* (1941) 121 Fed. (2d) 954 (C.C.A. 2d):

The privilege of "free speech", like other privileges, is not absolute; it

has its seasons; a democratic society has an acute interest in its protection and cannot indeed live without it; but it is an interest measured by its purpose. That purpose is to enable others to make an informed judgment as to what concerns them, and ends so far as the utterances do not contribute to the result. Language may serve to enlighten a hearer, though it also betrays the speaker's feelings and desires; but the light it sheds will be in some degree clouded, if the hearer is in his power. Arguments by an employer directed to his employees have such an ambivalent character; they are legitimate enough as such, and *pro tanto* the privilege of "free speech" protects them; but, so far as they also disclose his wishes, as they generally do, they have a force independent of persuasion. The Board (N.L.R.B.) is vested with the power to measure these two factors against each other – words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used, of which the relation between the speaker and the hearer is perhaps the most important. What to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be the manifestation of a determination which it is not safe to thwart. The Board must decide how far the second aspect obliterates the first.

While an employer's claim to state its case to its employees is qualified by the limitations imposed in section 56, an employer is entitled to express its views and is not confined to mere platitudes. It is the middle ground between mere platitudes and the interference and influence proscribed by section 56 that an employer is free to express its views.

12. The two cases which were relied upon by the applicant resulted in the holding of a new representation vote in the *Bush Gamble Company Limited* case, *supra*, and the issuance of a certificate pursuant to section 7(5) [now repealed] of The Labour Relations Act in the *Bell & Howell Canada Ltd.* case, *supra*. In our view the facts in the instant application are unlike the facts in the two cases cited by the applicant. In the *Bush Gamble Company Limited* case, *supra*, the Board held that a sentence in a speech made to employees during a meeting called by management was open to the interpretation that the success of a trade union in its organizational campaign could jeopardise the jobs of some employees. In the *Bell & Howell Canada Ltd.* case, *supra*, the Board determined that a so-called request to employees to attend a meeting during lunch hour amounted to an order. The Board held in the latter case that the attack on the trade union in that case was in part on the verge of inflammatory. The Board specifically found that the employer planted in the minds of the employees misgivings that if the trade union was successful in its organizing campaign the employer's operations would cease to be profitable and that the employees' jobs might then be placed in jeopardy. This conduct occurred in conjunction with the discharge of an employee. The Board found that this discharge was used as an object lesson and that the other employees were bound to interpret the discharge as an indication of the dangers involved in supporting the trade union.

13. In the instant application the respondent delivered the three letters to the employees in the bargaining unit. There is no evidence before the Board that the respondent in any way sought to intrude into the applicant's organizational campaign other than by the three

letters. In this respect, we note that prior to the direction of the representation vote the applicant withdrew its earlier allegations of irregular or improper conduct against the respondent. In addition, the respondent did not pressure its employees to attend a captive session in order to adumbrate its point of view. Apart from the two letters which the applicant relies on there is no evidence of any conduct by the respondent which even arguably suggests antipathy towards the applicant.

14. In evaluating conduct which leads up to the holding of a representation vote so as to determine whether that vote ought to be set aside, the Board has sought to establish whether the employees were capable of freely expressing their true wishes in that representation vote. The party which seeks to set aside a representation vote is required to establish that the impugned conduct has deprived the employees of the ability to freely express their true wishes. See the *Alcan Building Products Limited* case, [1971] OLRB Rep. Dec. 806. The effect of impugned conduct upon the employees is determined by looking at the objective facts of what has occurred and drawing reasonable inferences as to what is the more probable effect of such conduct upon the employees in all the circumstances, see the *Wolverine Tub, Division of Calumet & Hecla of Canada Ltd.* case, 63 CLLC ¶16,296. This is an objective test. The Board's approach is to determine the likely effect of the impugned conduct upon an employee of average intelligence and fortitude.

15. In the *Playtex Ltd.* case, [1972] OLRB Rep. Dec. 1027, the Board held that asking employees to vote and to vote against a trade union is protected by the provisions of section 56. Employers are free to express their opinions within the limits of that section and comments which come under its protection will not generally result in the ordering of a new representation vote.

16. The letter dated November 8, 1978, poses certain questions. These are not rhetorical questions and there is no innuendo against the applicant. No comments have been made about the applicant. In our view, the respondent is inviting its employees to seek veracity. What objection can there be to ascertaining the truth? We do not agree that the respondent was making comments about the applicant's internal operations. In addition, we do not agree that posing these questions when viewed in an objective manner focuses the issue away from the representation vote.

17. The letter dated November 10, 1978, is characterized by the applicant as an allegation about how organizers of trade unions operate and as carrying an implication that if the applicant is certified the security of the employees may be seriously affected because the respondent would not be as competitive. The applicant characterized this as a subtle threat and as constituting undue influence. In our view, this letter ought to be read in its entirety before characterizing its probable effect on the employees. Paragraph three, in our view, is a reasonable statement about conduct which may occur during the course of an organizational campaign. It is our opinion that an employee of average intelligence and fortitude would appreciate by analogy to the political process and by his own experience in life that not all promises and expectations are fulfilled. The statements about the respondent's ability to remain competitive and the matter of job security merely express a concern and do not, in our view, constitute coercion, intimidation, threats, promises or undue influence. The fifth paragraph is again a factual statement of what may occur during negotiations. There is no suggestion that the respondent will behave in a pre-determined way in the event that the applicant wins the representation vote. We agree that if reference to section 70(1) is made it

is preferable to refer to that subsection in its entirety. However, the gist of that subsection has been referred to and the respondent has not thereby used coercion, intimidation, threats, promises or undue influence with respect to the employees. The sixth paragraph is once again a statement about the respondent's operations. There is no suggestion that this statement is untrue and in our view it is not in breach of section 56. We do not agree with the applicant's characterization of the letter dated November 10, 1978. In addition, we do not agree that there is an inherent right to reply to propaganda before the onset of the direction to refrain and desist from propaganda and electioneering.

18. We have weighed the two factors referred to in paragraph eleven and find that the views expressed by the respondent in its letters to the employees are within the middle ground between mere platitudes and the interference and influence proscribed by section 56. In these circumstances we deny the applicant's request for a new representation vote. The application is therefore dismissed.

19. The Board will not entertain an application for certification by the applicant with respect to any of the employees of the respondent in the bargaining unit within the period of six months from the date hereof.

20. The Registrar will destroy the ballots cast in the representation vote in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30 day period.

DECISION OF BOARD MEMBER B. LEE:

Board Member B. Lee dissents for reasons to follow.

1488-78-R Don Hemmelskamp, Applicant, v. Christian Labour Association of Canada, Respondent.

Sale of a business – Timeliness – Termination – Collective Agreement – Effect of sale of business on timeliness of termination application – Whether document a collective agreement

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members H. J. F. Ade and O. Hodges.

APPEARANCES: *Alan Harries and D. Hemmelskamp for the applicant, and O. V. Gray and J. Adema for the respondent.*

DECISION OF THE BOARD; February 13, 1979

1. The applicant is seeking a declaration under section 49 of The Labour Relations Act that the respondent no longer represents the employees of Mortlock Construction (1978) Limited. It is an employer and the respondent is a trade union in the construction in-

dustry within the meaning of section 106 of the Act. The unit of employees in respect of which the application is made is described as "... all carpenters, carpenters' apprentices and construction labourers ..." employed by the employer in Board Area #11. Mortlock Construction (1978) Limited was found by another panel of this Board to be the successor employer in the sale of a business within the meaning of section 55 of the Act.

2. That decision of the Board issued July 26, 1978 (see Mortlock Enterprises Limited [1978] OLRB July 662) and contains the following statement:

"... the Board declares that there has been a sale of a business from A. Mortlock Enterprises Limited, (formerly, and also for certain purposes operating as, Mortlock Construction (1963) Limited) to Mortlock Construction (1978) Limited. It follows from this declaration that the Christian Labour Association of Canada is the bargaining agent for certain employees of Mortlock Construction (1978) Limited in accordance with the provisions of subsection (2) or (3) of section 55, whichever may be applicable."

The Board made no finding in its decision as to when the sale of business took place.

3. The respondent alleges that the application is untimely. Central to the respondent's timeliness allegation is its submission that it is bargaining agent for the employees of the employer in accordance with section 55(3) of the Act and not section 55(2), since no collective agreement existed between it and the predecessor employer Mortlock Construction (1963) Limited (hereinafter referred to as the "1963 company") at the time of either the sale or the Board's declaration. The respondent makes the further claim that it has given proper written notice under section 55(3) to the employer and, as a result, is shielded from an application for termination of bargaining rights by virtue of section 55(10) in the same way as if it had been certified under section 7. Thus it claims to be protected for twelve months from the date of the Board's section 55 decision. At the hearing into the application, the Board heard the evidence and argument of the parties on this preliminary issue and reserved its decision before proceeding to hear the merits of the application. In respect of the preliminary issue, the Board finds the following facts.

4. The respondent, in a letter dated September 22, 1977, duly notified the "1963 company" of its desire to bargain for renewal of the collective agreement between them which was due to expire October 31, 1977. On October 17, 1977, the respondent sent to the employer its detailed proposals for amendment of the agreement. The parties to the hearing agree that a conciliation officer was appointed on December 22, 1977 and as a result of a meeting of the respondent and the "1963 company" with the officer, a document entitled "LETTER OF INTENT" was agreed to and signed on January 5, 1978 and was ratified by the employees in the bargaining unit on January 17, 1978. It reads as follows:

"Between: Mortlock Construction (1963) Limited (The Company)
and: Christian Labour Association of Canada (The Union)

In view of the company's pending decision to cease operation, the company agrees to honour the existing collective agreement dated November 5, 1975. In the event that the company continues operations beyond

April 1, 1978, all matters in dispute for renewal of the collective agreement shall be resolved by arbitration failing joint resolution.

The Union undertakes to submit this agreement to the employees for ratification.

SIGNED January 5, 1978 at Peterborough"

5. The respondent wrote to the "1963 company" on January 19, 1978 asking if it intended to cease doing business. There is no evidence of any discussion taking place between those two parties. The respondent wrote again on March 8, 1978, this time seeking a meeting with the "1963 company" in order to "... finalize the matters in the letter of intent dated January 5, 1978.". Sometime in April 1978, representatives of the respondent met with Mr. A. Mortlock, president of the "1963 company", who advised them that it had ceased to exist and that its employees were now employees of the employer affected by this application. Following this meeting, the respondent applied to the Board on May 1, 1978, for a declaration under section 55 of the Act that a sale of a business had occurred between the "1963 company" and the employer, leading to the Board's decision issued July 26, 1978.

6. After the decision issued, John Adema, Ontario Representative for the respondent, tried unsuccessfully to arrange a meeting with the employer and on September 29, 1978 wrote a letter to it which reads in part as follows:

"Since the Ontario Labour Relations Board decision dated July 21, 1978, we have made several attempts to meet with you for the purpose of finalizing the terms of a collective agreement.

In order to finalize the terms for renewal of the collective agreement, we propose to proceed with arbitration as provided for in the Letter of Intent dated January 5, 1978. We suggest that an independent arbitrator be appointed and we suggest either Mr. H. D. Brown, Mr. J. D. O'Shea or Mr. J. F. W. Weatherill. The address of these arbitrators is Suite 701, 36 King Street East, Toronto, Ontario, telephone number 266-3091.

In the event we should not receive a written reply from you by Monday October 16, 1978, we will request the Ministry of Labour to appoint an arbitrator."

7. There was a meeting on November 1, 1978 between Adema and Mr. W. Mortlock, owner of the employer, at which Adema sought a response to the contract proposals contained in the respondent's October 17, 1977 letter to the "1963 company". Mortlock is one of the sons of the owner of the "1963 company". He was active in the management of that company, had been present at the negotiating meetings prior to the meeting of January 5, 1978 and was aware of the October 17, 1977, proposals for renewal of the collective agreement between the respondent and the "1963 company". Adema maintains that Mortlock undertook at the meeting to give the respondent a written reply to the proposals. While no written reply was forthcoming, Mortlock wrote to the respondent on November 9, 1978 as follows:

"I have recently met with the other directors of this company for the purpose of discussing revisions to the old contract and to respond to your proposals dated Oct. 17th, 1977.

I would suggest two possible meeting dates at our office at 680 The Parkway in Peterborough to discuss these items; one date being Tuesday, Nov. 21st, at 7.00 p.m. and the other being Thursday, Nov. 23rd at 7.00 p.m.

Would you kindly advise us if one of these dates is acceptable to you."

8. The application before this Board was filed on November 10, 1978 and on December 1, 1978 the respondent wrote again to the employer seeking a reply to its September 29th request to initiate arbitration under the Letter of Intent. This evoked the following reply, in a letter dated December 6, 1978, from the respondent:

"In reference to your letter of Dec. 1st, in which you suggest the appointment of an arbitrator; we submit that an arbitrator is not needed. If you insist on arbitration at this time, we do not accept any responsibility for any part of the costs involved.

We have received documentation from the Ministry of Labour confirming Application for Decertification. We therefore suggest that it is pointless for us to engage in further negotiations at this time. If, however, you still wish to meet with us here at our office on any day – Monday through Thursday, after 6.30 p.m., please advise us as to a convenient date."

9. If the respondent is to succeed with its claim that the application is not timely, the Board first must find that:

- a) the collective agreement between the respondent and the "1963 company" bearing the expiry date of October 31, 1977 had ceased to operate;
- b) the document dated January 5, 1978, entitled Letter of Intent, is not a collective agreement within the meaning of the Act; and
- c) the respondent's letter of September 29, 1978 is notice under section 55(3) to the successor employer that the respondent desires "... to bargain with a view to making a collective agreement ...".

If the respondent succeeds on the second point but fails on the third, then there would be no time bar operating against the application. If the Board should find that the Letter of Intent is a collective agreement, then it must determine what the term of that agreement is before it can decide whether the application is timely.

10. Several sections of the Act are relevant to deciding the timeliness issue. For the

Letter of Intent to be a collective agreement it would need to satisfy section 1(1)(e) of the Act which reads as follows:

- “1. (1)(e) – “collective agreement” means an agreement in writing between an employer ..., on the one hand, and a trade union that, ..., represents employees of the employer ..., on the other hand, containing provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, ..., the trade union or the employees, ...”.

Section 45, subsection 1 and 2 cover the giving on notice of desire to bargain for a new collective agreement.

- “45.-(1) Either party to a collective agreement may, within the period of ninety days before the agreement ceases to operate, give notice in writing to the other party of its desire to bargain with a view to renewal, with or without modifications, of the agreement then in operation or to the making of a new agreement.
- (2) A notice given by a party to a collective agreement in accordance with provisions in the agreement relating to its termination or renewal shall be deemed to comply with subsection 1.”

The application has been filed under section 49 and the applicable subsections are 1 and 2(a), but since the respondent and employer fall under the construction industry provisions of the Act, section 112(1) also applies.

- “49.-(1) If a trade union does not make a collective agreement with the employer within one year after its certification, any of the employees in the bargaining unit determined in the certificate may, subject to section 53, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit.
- (2) Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 53, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit,
- (a) in the case of a collective agreement for a term of not more than three years, only after the commencement of the last two months of its operation.
- 112.-(1) If a trade union does not make a collective agreement with the employer within six months after its certification, any of the employees in the bargaining unit determined in the certificate may apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit.”

Finally, the relevant subsections of section 55 dealing with the sale of the business from the "1963 company" to the employer are 2, 3 and 10.

"55.-(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the persons to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 13 or 45, sells his business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 13 or 45, as the case requires.

(10) For the purposes of sections 5, 49, 51, 53 and 112, a notice given by a trade union or council of trade unions under subsection 3 or a declaration made by the Board under subsection 6 has the same effect as a certification under section 7."

11. The collective agreement that was in force between the respondent and the "1963 company" clearly ceased to operate as of October 31, 1977 by effect of notice duly given by the respondent on September 22, 1977. That agreement, therefore was not in effect at the time of the Board's section 55 decision. Thus no rights under section 55(2) were conferred on the respondent in respect of that agreement. It would have rights under this section, however, should this Board find that the Letter of Intent constitutes a collective agreement under section 1(1)(e).

12. Section 1(1)(e) requires that two criteria be satisfied for an agreement to constitute a collective agreement.

- a) It must be an agreement in writing between an employer and a trade union that represents employees of the employer.

- b) It must contain provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, the trade union or the employees.

There is no doubt that the Letter of Intent satisfies the first criterion, including the implied requirement that the agreement be signed by the parties to it. The letter, on its face, does not seem to satisfy the second criterion unless, as was argued by the applicant's counsel, the words "... the company agrees to honour the existing collective agreement dated November 5, 1975." imports the terms, conditions or rights of the employer, trade union or employees from the expired collective agreement. It is not uncommon, in the Board's experience, for parties to establish a collective agreement by reference to another one. If that was the objective of the parties for this document, we think it fails to achieve the objective. The letter's second sentence denies the intent of the parties to achieve a new or renewed collective agreement by reference to the old one because it provides for resolution by arbitration of "... all matters in dispute for *renewal* of the collective agreement ..." (emphasis added) should the "1963 company" continue operation beyond April, 1978. Therefore, whatever the parties intended the Letter of Intent to be, the Board finds that it is not a collective agreement within the meaning of section 1(1)(e) of the Act. It is unnecessary for the purposes of this decision for the Board to find what the document is.

13. Thus the respondent has no rights as bargaining agent flowing from section 55(2). It remains now to determine its rights, if any, under section 55(3). Since the respondent gave due notice to the "1963 company" under section 45 of the Act, it is entitled to give the employer "... written notice of its desire to bargain with a view to making a collective agreement ..." Does its letter to the employer of September 29, 1978 constitute such written notice? The Board finds that it does. While it does not specifically refer to giving notice under section 55(3), it refers to the Board's section 55 decision and to the respondent's desire "... to meet ... for the purposes of finalizing the terms of a collective agreement.". The fact that it also seems to express a desire to renew the terms of the expired collective agreement with the "1963 company" and erroneously, in the Board's view, seeks to invoke the arbitration provisions of the Letter of Intent, does not detract from or confuse the purpose of the letter in the circumstances of this case. Mortlock was aware of the collective agreement with the "1963 company" and the original proposals for its renewal at the time of the sale. Furthermore, it may be inferred from his letters to the respondent dated November 9, 1978 and December 6, 1978 that he understood an obligation to bargain. In the result, the Board finds that, on or about September 29, 1978, the respondent has given written notice under section 55(3) to the employer of its desire to bargain.

14. It follows, then, from the effect of section 55(10), that the respondent is in the same position insofar as the section 49 application for termination of bargaining rights is concerned, as though it had been certified by the Board as of the respondent's giving of notice under section 55(3). Since this application falls under the construction industry provisions of the Act, it is the time limit expressed in section 112(1) which applies in the circumstances of this case, not section 49(1). The effect of section 112(1) is to give the respondent a six month period during which it is protected from applications for termination of its bargaining rights (providing the time limit has not been extended under section 53 by the appointment of a conciliation officer, and there is no appointment in this case). The application for termination of bargaining rights filed on November 10, 1978 falls within this six months period and therefore is untimely.

15. Before concluding this decision, the Board wishes to deal with an argument raised by counsel for the applicant. It was argued in the alternative that, should the Board find the Letter of Intent not to be a collective agreement under section 1(1)(e) of the Act, the letter was an agreement under section 34c(1) of the Act, and therefore constituted a collective agreement under which the Board could determine that the application was timely. This section of the Act permits parties in collective bargaining to "... irrevocably agree in writing to refer all matters remaining in dispute between them to an arbitrator ... for final and binding determination." Even if the Board were to make a finding under section 34c(1) in favour of the applicant, and it makes no finding at all, it would not raise a timeliness bar to this application. An irrevocable agreement in writing under section 34c(1) is given the same effect by section 34c(3) as a collective agreement for purposes of section 53 and section 112 of the Act, but this does not make it a collective agreement for all purposes, or any other purposes, of the Act. Thus it is not a collective agreement for purposes of section 55. Therefore the Letter of Intent does not flow through to the successor employer (the employer in this case) under that section.

16. Having regard to the particular circumstances of this case and for all of the above reasons, the application is dismissed.

1502-78-R Hotel and Restaurant Employees and Bartenders' International Union, Restaurant, Cafeteria and Tavern Employees Union, Local 254, (Applicant), v. **Japamco Company Limited**, (Respondent).

Certification – Charges – Employer alleging managerial involvement in solicitation of membership support – Employee reasonably perceived as acting contrary to employer interest – No reasonable inference of employer sponsorship of trade union

BEFORE: Rory F. Egan, Alternate Chairman, and Board Members C. G. Bourne and M. J. Fenwick.

APPEARANCES: *Douglas J. Wray and J. Sobolewski for the applicant; Sam I. Fujii, S. John Page and S. Yamamoto for the respondent.*

DECISION OF RORY F. EGAN, ALTERNATE CHAIRMAN, AND BOARD MEMBER M. J. FENWICK; February 28, 1978

1. This is an application for certification which the respondent submitted the Board ought to dismiss because the provisions of section 12 of The Labour Relations Act are applicable.

2. Section 12 provides:

The Board shall not certify a trade union if any employer or any employers' organization has participated in its formation or administration or has contributed financial or other support to it or if it

discriminates against any person because of his race, creed, colour, nationality, ancestry, age, sex or place of origin.

3. There has been no complaint by anyone in the proposed bargaining unit of interference or coercion that the employer has participated in the formation or administration of the applicant or has contributed financial or other support to the applicant trade union. It is therefore the employer alone who opposes the application on the basis of conduct, which, if proven, brings it within the ambit of section 56 of the Act which provides as follows:

No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

4. We mention the foregoing because it is a factor to be taken into consideration in weighing the whole of the evidence because of the inherent contradiction involved in that the employer seeks dismissal on the grounds of its own alleged support for the union whose application it, at the same time, seeks to have dismissed.

5. The question raised by the respondent centres around the activities of Jun Asahina, who the respondent claimed was a manager at the Fuji Japanese Restaurant and Tavern, the premises covered by the application.

6. Evidence was heard with respect to the duties and responsibilities of Asahina at the restaurant. It is our opinion, however, that even if it be assumed that Asahina was the manager of the restaurant as far as the dining room operation is concerned (he had nothing to do with the kitchen staff except to make purchases of small items at the request of the chef), it would have no effect upon the outcome of the issues raised by the respondent.

7. It is very clear that Asahina played a prominent part in introducing and promoting the union among the employees in the proposed bargaining unit. This went to the extent that he accompanied the employees to an outside restaurant where they met the union organizer. Asahina even loaned money to one of the employees who, in turn, loaned it to another employee for the purpose of the initiation fee. The rejection of this card by the Board, however, does not materially affect the count.

8. It might be proper at this time to observe that the union organizer and collector was of the opinion, based upon his experiences in the restaurant field, that Asahina was simply another employee and not part of management. The evidence on the point of Asahina's status would tend to support that as a credible conclusion.

9. The Board has said in *Children's Aid Society of Metropolitan Toronto*, [1976] OLRB Rep. Nov. 651, that it

... recognizes that in the modern organizational setting the interests of

individual persons deemed to be managerial are not necessarily coincidental with those of the employer. If the evidence establishes that such persons acted on behalf of or in the interests of the employer then undoubtedly the section 12 bar would apply. If, however, the evidence establishes that the persons were acting not on behalf of the employer but contrary to the wishes and interests of the employer (see *Air Liquide* case [1964] CLLC 16,002) then it cannot be said that the employer has participated contrary to Section 12, or section 56 for that matter. Similarly if the evidence establishes that the disputed persons have been acting in their self interest rather than on behalf of or in the interest of the employer, then again Section 12 should not be activated.

10. In this regard, we remark that Mr. Fujii, who is Vice-President and Secretary-Treasurer of the respondent, said that he did not instruct Asahina to get a union into the restaurant. He echoed this when he stated: "Asahina was not acting on my instructions in organizing a union". Fujii was concerned about the organizational drive and asked Asahina if he was the leader of the union to which, according to Fujii, Asahina replied that he had nothing to do with it. Fujii also made other inquiries of other employees whom he had called to a meeting about the union. Present at this meeting was a Mr. Yamamoto, who is President of the company. This meeting took place on December 12, 1978 which was the terminal date of the application. The notice of application had been received on December 4. The purpose of the meeting, according to Mr. Fujii was to find out what the employees had in mind and what they knew about the union. There was no suggestion whatever that the employer was promoting the union. Fujii told the Board that he had wanted to find out and solve the problem beforehand – that the employees might need the union for other reasons but if he could solve the problem, it would help. He pointed out that a union was important and that if they had problems, they would have to go to the union and not to management. Asahina testified that Fujii also warned them that if the employees went ahead with the union, their tips would have to be reported to the income tax authorities. He also mentioned that he would fire all the waitresses. By this time the application had already been filed and notice received. The point is, of course, that this course of conduct is hardly consistent with any suggestion that Asahina was or was seen by the officers of the employer company to be acting in its interests or on its behalf.

11. Asahina himself testified as to his motives in acting as he did. In May or June of 1978, Asahina went with seven or eight employees to see Mr. Fujii because they were not getting overtime or statutory holiday pay. He said Fujii told them that it was not company policy to pay either of these items but that if the employees persisted, he would keep the full amount of tips given on credit cards and use that money to pay statutory holiday pay and overtime and that anything left over would be a bonus. The custom at the time had been to split the tips with 50% to the management and the remainder to the waiters.

12. Mr. Asahina felt that there was injustice being done to the employees and went to see his M.P.P. who suggested that the *Employment Standards Act* could be invoked but that Asahina ought to contact a union. Asahina said that he felt they needed the protection of a union in order to force Fujii to pay for overtime and statutory holidays.

13. Asahina talked to the employees and explained that he planned to report the matter to Employment Standards and that a union was needed to give them protection. He said that he wanted the union because he was very determined that justice be done.

14. There is no question that any reasonable employee would clearly see that Asahina was concerned with the employees' interests and was acting contrary to the interest of the employer. There was evidence from an employee who was called by the company that the meeting at which the cards were signed was held at another restaurant because the employees were afraid that Fujii might have come upon them if they had used his restaurant. There was also evidence that the employees laughed at Fujii because he obviously was unable to find out how many people had joined the union.

15. The evidence in the present case makes it abundantly clear that Asahina at no time acted in the interest of the employer but, on the contrary, did and must have been seen to act by any reasonable employee wholly in the interest of the employees against those of the employer.

16. We consequently find that section 12 of the Act does not come into play in this case and that the employees joined the trade union voluntarily and to promote their own interest, and free of any managerial inducement or coercion.

17. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.

18. The Board further finds that all employees of the respondent at Fuji Japanese Restaurant at 769 Yonge Street, Metropolitan Toronto, save and except manager, persons above the rank of manager, office staff, and persons regularly employed for not more than 24 hours per week, constitute a unit of employees of the respondent appropriate for collective bargaining (hereinafter referred to as bargaining unit #1).

19. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in bargaining unit #1 at the time the application was made were members of the applicant on December 12, 1978, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

20. A certificate will issue to the applicant with respect to bargaining unit #1.

21. The Board further finds that all employees of the respondent at Fuji Japanese Restaurant at 769 Yonge Street, Metropolitan Toronto regularly employed for not more than 24 hours per week, save and except manager, persons above the rank of manager, and office staff, constitute a unit of employees of the respondent appropriate for collective bargaining (hereinafter referred to as bargaining unit #2).

22. The Board is satisfied on the basis of all the evidence before it that more than fifty-five percent of the employees of the respondent in bargaining unit #2 at the time the application was made were members of the applicant on December 12, 1978, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

23. A certificate will issue to the applicant with respect to bargaining unit #2.

DECISION OF BOARD MEMBER C. G. BOURNE:

1. I have to dissent from the decision of my colleagues.
2. In my view Mr. Asahina, in his capacity as one of the two assistant managers who divide the responsibilities between them, clearly breached the provisions of section 12 of the Act.
3. Asahina was the originator of the move to unionize. He contacted the union representative, notified the employees of the several meetings that took place in a cafe across the street, helped to sign up members, supplied the \$1.00 payment in at least one instance, and himself signed a card. This clearly violates the Board's strict rule of maintaining an arm's length relationship as set out, for example, in *Canada Crushed Stone*, [1977] OLRB Rep. Dec. 814.

1677-78-M J. S. Mechanical, (Employer), v. Local Union 800 of the United Association of Journeymen and Apprentices of the Plumbing & Pipe Fitting Industry of the United States and Canada, (Trade Union).

Abandonment – Construction Industry – Reference – Board finding that trade union had abandoned its bargaining rights

BEFORE: Pamela C. Picher, Vice-Chairman and Board Members W. F. Rutherford and W. H. Wightman.

APPEARANCES: *R. D. Tafel, James E. Bowden and Donald J. McKillop for the employer and Richard Schofield for the trade union.*

DECISION OF THE BOARD; February 20, 1979

1. Pursuant to section 96 of the Labour Relations Act, the Minister has referred to the Board the question of whether the Minister has authority under the Act to appoint a Conciliation Officer.
2. The respondent trade union, Local Union 800, obtained bargaining rights through voluntary recognition from the employer, J. S. Mechanical, and the parties concluded a collective agreement effective from October 1, 1973 through April 30, 1975. On February 5, 1975 the union gave the employer a timely notice to bargain to renew the collective agreement. On February 21, 1975 the employer responded by stating that it did not want to renew the collective agreement. The union reasserted its request to meet and bargain and on May 23, 1975 requested the appointment of a Conciliation Officer. On June 30, 1975 the Minister appointed a Conciliation Officer and a meeting was convened on July 16, 1975. On July 24, 1975, the Minister notified the parties that the Conciliation Officer reported that the differences between J. S. Mechanical and Local Union 800 had been settled. The parties agree that this notice was based on an error of fact and that no settlement of di-

ferences had ever been made. On August 7, 1975 the union advised the Conciliation Officer in writing of the mistake. The matter stood in limbo for almost three and a half years when on November 24, 1978, the union asked the Ministry whether a "No Board Report" had ever been issued. On November 30, 1978 the union applied for the appointment of another Conciliation Officer. The question before this Board is whether the Minister has the authority under the Act to appoint another Conciliation Officer.

3. The employer opposes the appointment of the Conciliation Officer on the grounds that it is no longer obliged to bargain with the union because the union has abandoned its bargaining rights through a failure to assert them for over three years.

4. Over the last 20 years the principle of abandonment has been deeply entrenched in the Board's jurisprudence. Once a union has obtained bargaining rights either through certification or voluntary recognition it is expected that it will actively promote those rights. If a union declines to pursue bargaining rights it may lose them through disuse. Whether a union has abandoned its bargaining rights is a matter which must be assessed on the facts of each individual case, but once the Board is satisfied that a union has failed to preserve its rights, the union may no longer rely on them to support the appointment of a Conciliation Officer under section 15 of the Act (see *Cooksville Sheet Metal*, [1974] OLRB Rep. June 365; *John Entwistle Construction Limited*, [1972] OLRB Rep. Oct. 919; *Elgin Construction Co. Limited*, [1969] OLRB Rep. April 134; *Guelph Cartage Company*, 55 CLLC para. 18,018). As well, if a union has abandoned its bargaining rights it may be precluded from relying on them either to bar another agreement that renews itself automatically (see *Catalytic Enterprises Limited*, [1974] OLRB Rep. April 264; *O. & W. Electronics Limited*, [1970] OLRB Rep. Jan. 1213; *Architectural Acoustics & Drywall*, [1970] OLRB Rep. Feb. 1408; *N. W. Clayton Sheetmetal and Heating Co. Ltd.*, [1967] OLRB Rep. April 69), or to require an employer to bargain by giving notice to bargain under such an agreement (see *Rainee Manufacturing Products Limited*, [1967] OLRB Rep. Nov. 796). A union's abandonment might also obviate the necessity for the Board to determine the merits of a termination application (see *Graphic Centre (Ontario) Inc.*, [1977] OLRB Rep. June 379; *Northern Engineers & Supply Co. Limited*, [1968] OLRB Rep. Oct. 731; *Barrie Tanning Limited*, [1966] OLRB Rep. May 128).

5. In assessing the bargaining relationship between the union and the employer to determine whether or not a union has abandoned its bargaining rights, the Board considers various factors. Among other possible indicators, the Board looks to the length of the union's inactivity, whether it has made attempts to negotiate or renew a collective agreement, whether the union has sought to administer the collective agreement through the grievance and arbitration provisions in the collective agreement, whether terms and conditions of employment have been changed by the employer without objection from the union as well as whether there are any extenuating circumstances to explain an apparent failure to assert bargaining rights.

6. In the case before the Board the evidence establishes that since 1974 no grievances or arbitrations have been processed under the terms of the collective agreement. Check off and hiring hall provisions of the collective agreement have not been enforced. Although there have been employees within the bargaining unit consistently since 1974, the union has not maintained its membership among them. In short, the evidence establishes that since August 1975, almost three and one half years ago, the union has done absolutely nothing to promote the bargaining rights for the employees it represents and, in fact, de-

served the employees and employer in the middle of its own attempt to renew the collective agreement. Although the employer appeared unwilling to negotiate a renewal agreement, there were avenues open to the union by which it could have required the employer to recognize its bargaining rights. Instead of pursuing those routes the union withdrew from the relationship after advising the Ministry that no agreement had been reached between the parties.

7. In view of these circumstances the Board is satisfied that through sleeping on its rights for almost three and a half years the union has abandoned its bargaining rights and may not at this point revive them.

8. In answer to the question referred to the Board by the Minister, therefore, it is our opinion that since the union has abandoned its bargaining rights the Minister does not have the authority to appoint a Conciliation Officer in this matter.

1557-78-R Carol Jean Thomas, (Applicant), v. Ontario Nurses Association, (Respondent), v. MacKenzie Nursing Home Limited, (Intervener).

Termination – Petition found to be voluntary and sufficiently clear to satisfy statutory requirements – Possible misnaming of incumbent insufficient to suggest employees misled as to effect of petition

BEFORE: E. Norris Davis, Vice-Chairman, and Board Members C. G. Bourne and M. J. Fenwick.

APPEARANCES: *James R. Turnbull and Carol Jean Thomas for the applicant; Larry Robbins, Ella Johnson and Sophie Godzisz for the respondent; T. W. Wilson and Gordon MacKenzie for the intervener.*

DECISION OF E. NORRIS DAVIS, VICE-CHAIRMAN, AND BOARD MEMBER C. G. BOURNE; February 1, 1979

1. This is an application for a declaration terminating the bargaining rights of the respondent.

2. The intervening company took a preliminary objection to the material filed by the respondent under paragraph 7 of its reply on the grounds that it was not relevant to the matters in issue and was defective in not supplying particulars of the allegations made. The Board was of the opinion that the material was irrelevant to this application and granted the intervener motion to have it struck from the record.

3. The respondent, as a preliminary objection, argued that the application names as respondent "Ontario Nurses Association, Local 72" and that Local 72, as such, is neither the bargaining agent for the persons affected nor a trade union under The Ontario Labour Relations Act. The respondent, in filing its reply, stated the correct name of the respondent

to be "Ontario Nurses Association", which is the party to a collective agreement between itself and the intervener covering the persons here affected and which came into effect July 7, 1977 and continuing to be effective up to and including December 31, 1978. The applicant argued that if the respondent had been incorrectly described the Board should exercise its curative powers under section 93 of the Act. The Board reserved decision on the respondent's preliminary objection and proceeded to hear the evidence.

4. The applicant, Carol Jean Thomas, is an employee of the intervener and employed in the bargaining unit affected. No objections were raised to the timeliness of the application. On the date of the application there were 13 employees in the bargaining unit and an additional two employees whose lay off is currently the subject of arbitration. The bargaining unit is described as:

"All registered and graduate nurses employed by the MacKenzie Nursing Home Limited (Downtown Convalescent Centre) in a nursing capacity save and except the Director of Nursing and persons above the rank of Director of Nursing."

5. The documentary evidence filed by the applicant consisted of a handwritten two page document containing the witnessed signatures of 11 persons found by the Board to be employed by the intervener in the bargaining unit represented by the respondent. The heading of the document reads:

"Petition for declaration terminating bargaining rights before The Ontario Labour Relations Board

Between

Applicant Carol Jean Thomas, Reg. N.

and

The Ontario Nurses Association, Local 72.

We, the undersigned being employees of the MacKenzie Nursing Homes Limited wish to terminate our bargaining rights with The Ontario Nurses Association, Local 72, and signed this petition in support of an application for a declaration terminating those bargaining rights."

6. The enquiry conducted by the Board into the circumstances surrounding the origination and circulation of this document, in the Board's opinion, warrant a conclusion that such document does represent the true wishes of employees, voluntarily expressed. Counsel for the respondent does not argue to the contrary, but does argue, as an extension to its preliminary objection, that the use of the designation "Ontario Nurses Association, Local 72", is misleading and creates an ambiguity as to the intention of signatories in affixing their signatures to that document.

7. Evidence given by Mrs. Ella Johnson, an official of the Ontario Nurses Associa-

tion established that under the Constitution of that Association, copy of which was filed with the Board, since 1974 it has been the practice to combine small groups of members into a Local for administrative purposes. Local 72 embraces, at present, members of three bargaining units in Hamilton, Ontario, one of which is that of the MacKenzie Nursing Home. The Board's attention was directed to Article 18.04 of the Constitution which states,

"All collective agreements with employers of members shall be signed and entered into by the Association as the contracting party on behalf of the members affected thereby, and the Association shall authorize a person or persons to sign any such agreements on its behalf. Any such agreement shall also be signed by one (1) or more representatives of the Chartered Local Association(s) whose members are affected by ..."

The Constitution also provides that a Local shall establish a negotiating committee of which the President of the Local shall be President.

8. It seems evident that while the Local has no power to enter into a collective agreement in its own name, it does have a role to play in negotiating with the employer. In this respect Locals of this Association differ from "Locals" of many national and international unions which may have a contracting authority in their own right. In our view, Locals of this Association are the extension of the authority and personality of the Association itself and not a separate entity, despite the fact that they do play a role in the collective relationship. The Local is an administrative sub-division within the Association itself designed to more effectively prosecute the aims and objectives of the Association.

9. Counsel for the respondent argues that by including the words "Local 72" in the description of the bargaining agent in the heading of the petition it could have misled or confused the signatories into believing that their expression of desire as merely to express dissatisfaction with the administrative sub-division designated as Local 72 rather than expressing dissatisfaction with their bargaining agent. No evidence was led to establish that any of the signatories were so misled but in the contrary the evidence did establish that eight out of the eleven signatories personally retained counsel for the purpose of terminating the rights of their bargaining agent and also personally participated in a meeting with counsel to discuss the procedural requirements in pursuing that objective. Additionally, in our view, the language of the petition heading leaves little doubt that its purpose was to secure a termination of bargaining rights.

10. The instant case cannot be considered to parallel the circumstances in the *Hiram Walker* case [1973] OLRB Rep. Nov. 603 where the heading in the petition referred to the International union and not the Local which was in fact the bargaining agent. The Board here refused to accept the documentary evidence as definitive of the wishes of employees to terminate the rights of their bargaining agent. From a reading of that case it is apparent that there was considerable employee dissatisfaction with the International and there was oral evidence to the effect that "the purpose of decertification is to get rid of the International and not the Local" and that employees "signed the petition because they were against the International Union and their loyalties were with Local 61".

11. We are of the opinion that the incorrect naming of the respondent in the instant case was as a result of a bona fide mistake and that the style of cause herein should be amended to substitute as respondent "Ontario Nurses Association".

12. We are further of the opinion that the documentary evidence submitted unequivocally demonstrates the voluntary wishes of those employees signing to be no longer represented by the Ontario Nurses Association.

13. The Board is satisfied on the basis of all the evidence before it that not less than forty-five per cent of the employees of the MacKenzie Nursing Home Limited, in the bargaining unit at the time the application was made were members of the applicant on December 28, 1978, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

14. A representation vote will be taken of the employees of the respondent in the bargaining unit. All employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

15. Voters will be asked to indicate whether they wish to be represented by the applicant in their employment relations with the respondent.

16. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER M. J. FENWICK:

1. I dissent.

2. The Board's jurisprudence in certification matters makes it clear that an application for union membership must clearly set out the name of the organization in which membership is sought and which is applying to the Board and failure to do so results in dismissal.

3. In this instant case the Ontario Nurses Association was certified as the bargaining agent covering the employee unit in the MacKenzie Nursing Home Limited. The applicant, Carol Jean Thomas circulated a petition which sought termination of bargaining rights of the Ontario Nurses Association, Local 72.

4. I am not persuaded that persons who signed the petition were actually seeking termination of representation by the Ontario Nurses Association. In view of the ambiguity created by the addition of "Local 72" to the name of the bargaining agent I would have followed the Board's practice in certification proceedings and dismissed the application.

1044-78-U James Mason, personally, and on behalf of those parties listed in Exhibit "A" attached hereto, (Complainant), v. The Canadian Union of Public Employees, Local 87, (Respondent).

Duty of Fair Representation – S-79 – Union signing agreement creating wage differential between permanent and summer student employees – Agreement signed when no students employed – Change proposed by employer and union deciding to accept package and declining to strike on this issue – No breach of section 60 found.

BEFORE: R. A. Furness, Vice-Chairman.

APPEARANCES: *William G. Shanks and D. James Mason for the complainant; Hugh Lennon, James Pearce, Tibor Fordus, D. Petrunka and Brian Gracey for the respondent.*

DECISION OF THE BOARD; February 2, 1979

1. The complainant has complained that the grievors have been dealt with by the respondent contrary to the provisions of sections 60 and 60a of The Labor Relations Act. The complainant requests that (a) the discrimination and the specific category established for students be abolished; (b) the respondent if found to have acted contrary to section 60, be ordered to pay to the students the difference between the lowest labouring rate and the negotiated lower student rate and (c), in the alternative, the students' union dues and initiation fees be reduced by an amount expressed as a percentage, being the differential between the student rate and the lowest labouring rate.
2. At the commencement of the proceeding the complainant asked that the Corporation of the City of Thunder Bay (the "Corporation") be added as a party to the proceeding. The Corporation was represented at the hearing and had notice of the hearing and raised no objection to being added as a party. In these circumstances the Corporation is hereby added as a party to this proceeding.
3. The respondent objected to the status of the complainant to make this complaint on the grounds that none of the grievors were in the bargaining unit on the date of the ratification of a memorandum of settlement by the respondent. The complainant pointed out that section 60 refers to "in the unit" and it was the contention of the respondent that none of the grievors were in the unit on that date. The respondent argued that the duty of fair representation imposed by section 60 applies only to employees in the bargaining unit and that persons not in the bargaining unit at the time of the alleged offence have no status to bring such a complaint. In support of its position the respondent cited the *Operative Plasterers' and Cement Masons' International Association, Local 48* case, [1974] OLRB Rep. March p. 169; the *Canadian Union of Public Employees, Local 1334* case, [1974] OLRB Rep. March p. 176; and the *United Brotherhood of Carpenters and Joiners of America: Carpenters' District Council of Toronto and Vicinity* case, [1974] OLRB Rep. March p. 177. The respondent stated that the grievors who are affected by this complaint were students employed during the summer and were no longer employed as of the date of the filing of this application, namely, September 18, 1978, and did not enjoy any right to return to the employ of the Corporation during any summer in the future.

4. The Board reserved on this question of the status of the complainant to file this complaint and proceeded to hear evidence with respect to the merits of this complaint.

5. The evidence established that the complainants were at all material times students who were pursuing their studies on a full-time basis. Some of the students who are affected by this complaint were initially hired by the Corporation as early as July of 1974 and others as late as June of 1978. The complainants are hired by the Corporation on a seasonal basis during the period from April to September. During 1978 there were approximately one hundred and three students employed by the Corporation who are included in the bargaining unit represented by the respondent. Other students who are not represented by the respondent are paid hourly rates by the Corporation commencing at a minimum rate of \$2.85 per hour.

6. In a series of collective agreements which were in effect between the respondent and the Corporation between January 1, 1970, and December 31, 1977, a distinction is made between "regular employees" and "students". While the wording in these collective agreements varies, in general terms a "regular employee" is defined as a person who has satisfactorily served the required probationary period and who is normally employed in a full-time position of a continuing nature. "Student" is defined as a person who is employed for the duration of the school vacation period and who was a student at a school, college, university or other educational institution prior to becoming employed by the Corporation and who is intending to return to school at the end of the vacation period. Under the terms of these collective agreements which were in existence between January 1, 1970, and December 31, 1977, students who are employees do not accumulate seniority. In addition, only regular employees are covered by a sick leave credit plan and there is one system of computing vacations with pay for regular employees while employees with less than one year of service receive pay for vacations in accordance with *The Employment Standards Act*. These provisions with respect to regular employees are continued in the current collective agreement between the respondent and the Corporation and which is in effect from January 1, 1978, until December 31, 1979. The complainants have not objected in this complaint to any of the provisions which have been referred to in this paragraph.

7. The complainants object to the existence in the current collective agreement of a differential of forty-two cents per hour in the rates for labourers and student labourers. For the first time in collective bargaining between the respondent and the Corporation the new classification of student labourer has been included in a collective agreement. As of January 1, 1978, the current collective agreement provides that labourers receive \$6.55 per hour while student labourers receive \$6.13 per hour. Student labourers receive an hourly rate which is about six and a half per cent less than the labourers receive. Prior to January 1, 1978, regular employees who commenced work as full-time labourers were paid the same rate of pay as students who commenced work as labourers.

8. The respondent submitted proposals for bargaining with the Corporation for the proposed new collective agreement referred to in the preceding paragraph. To this end the respondent invited proposals to be submitted to the bargaining committee. A series of meetings were held between the employees of the respondent and the bargaining committee formulated proposals for bargaining with the Corporation. At no time did the respondent's proposals include a distinction between labourers and student labourers. After several meetings between the bargaining committee and the Corporation the latter produced a survey of

wage rates paid by municipalities in Ontario of comparable size to Thunder Bay with respect to leadhands, automechanics, labourers, equipment operators and truck drivers. These figures, in the view of the Corporation, indicated a considerable overpayment by the Corporation for these classifications. This led to a final position by the Corporation during the final days of negotiations that there should be a differential in the rate between student labourers and labourers of forty-two cents per hour so that the Corporation could recoup some of the monetary items for other classifications. The chairmen of the negotiating committees of the respondent and the Corporation signed a memorandum of basis of settlement on March 28, 1978, and by the terms of the memorandum agreed to recommend it to their principles.

9. After the signing of this memorandum, the members of the respondent's negotiating committee were divided over the acceptance of the differential of forty-two cents between the rate for a labourer and the rate for a student labourer. Two members of the negotiating committee agreed with this differential and the other two members of the negotiating committee did not agree with this differential. Upon discovering that it was tied, the committee decided to make no recommendation to the membership with respect to the hourly rate for student labourers. In the view of the committee the membership of the respondent was to decide whether to ratify the memorandum.

10. The respondent called a special meeting of its membership in order to consider the question of the ratification of the memorandum. Section 5 of the respondent's by-laws states that special meetings require at least twenty-four hours notice to the parties concerned. A special meeting was called for Sunday, April 16, 1978. The respondent's recording secretary prepared the notice of the meeting. In accordance with the respondent's practice since 1948 the notice and purpose of the special meeting was posted on several bulletin boards. In fact, the notices were posted on the bulletin boards about eight or nine days before April 16, 1978. No one received personal and individual notice of the special meeting.

11. Approximately eighty-five employees of the Corporation and members of the bargaining unit attended the special meeting. There was a full discussion of the terms of the memorandum. There was a motion at the meeting that the rate for a student labourer be included in the memorandum of settlement. This motion was lost. A further motion was defeated with respect to the term of the memorandum of settlement. After further debate a motion was carried that the memorandum of settlement be accepted with the inclusion of the differential in the rates between labourer and student labourer. The Corporation was notified of the ratification and in turn ratified the memorandum of settlement.

12. James Mason is a student in the third year of a programme for a degree of bachelor of arts at Lakehead University. He has worked for the Corporation as a labourer during the summer season over a period of five years, commencing in 1974. It is his position that he is eligible for re-hiring by the Corporation in 1979. Applications for employment in 1979 are made during the preceding winter months. Mr. Mason believes that he would have preference for employment with the Corporation over students who have not previously worked for the Corporation. The only difference between the job performed by the student labourer and the job performed by a labourer who is regularly employed lies in the time of year when the student labourer is employed by the Corporation. A student labourer does not perform tasks which are associated with winter.

13. Mr. Mason was initiated as a member of the respondent in May of 1977 and it appears that he has paid dues to the respondent during the time that he has been employed by the Corporation since 1974. He first heard of the negotiations for the current collective agreement upon finishing his academic year in 1978. At that time a fellow worker told him of the contents and ratification of the new collective agreement. The differential of forty-two cents in the hourly rate soon became generally known to the students who anticipated working for the Corporation during the summer of 1978. The students held meetings to discuss their position. They concluded that they had been mistreated and determined to change this state of affairs and eliminate the differential of forty-two cents. During this period some of the regular employees expressed their opinions that the students should be grateful for what they received and admonished them to be quiet.

14. Some of the students attended the regular membership meetings of the respondent and sought to eliminate the differential in wage rate. During the regular meeting in August of 1978, between twenty and twenty-five students attended. While a motion to lower the dues payable to the respondent did not reach the floor, a motion was adopted that the respondent send a letter to the Corporation and request that negotiations be re-opened with respect to the differential in wage rate. The letter was sent to the Corporation, a meeting was arranged and the Corporation refused to re-open the current collective agreement.

15. Mr. Mason expressed the view that, while he had not attended any special meetings in previous years with respect to the ratification of collective agreements, he would have attended the special meeting on April 16, 1978, if he had known of the terms of the memorandum of settlement and the time, date and place of the special meeting. He further expressed the view that a sufficient number of students would have conducted themselves in the same manner and would have prevented the ratification of the memorandum of settlement which contained the differential in wage rate. Neither Mr. Mason nor any of the other students provided the respondent with any forwarding addresses.

16. The complainants stated that there were four issues before the Board. Firstly, whether the grievors are employees in the bargaining unit. Secondly, whether notice was given to the students. Thirdly, whether there had been a denial of the right to be heard by the respondent. Fourthly, whether the conduct of the respondent was discriminatory and in bad faith in not regarding students as a legitimate classification of employee. With respect to the status of the complainants to make this complaint, it was emphasized that they returned year after year for employment during the summer and they had in reality acquired a type of seniority because of their expectation of being re-hired during each summer as long as they were students. The complainants argued that the respondent had acted arbitrarily within the limits of its own procedure in merely posting the notice of the special meeting on the bulletin boards. The complainants referred to the failure of the respondent to at least go to the brink of a strike before agreeing to the memorandum of settlement and characterized the respondent's conduct as a careless throwing away of students' bargaining rights.

17. The respondent emphasized that the differential in the hourly wage rate of forty-two cents had been proposed by the Corporation and forced on the respondent as part of the memorandum of settlement. It was the position of the respondent that the acceptance of the Corporation's final offer was in the best interests of all members of the bargaining unit. The respondent pointed out that notice of the special meeting was given in accordance with

its by-laws and its past practice and denied that it had acted in a manner that is arbitrary, discriminatory or in bad faith towards any of the grievors. It was argued by the respondent that it had been placed in a position by the Corporation where it had to make critical choices which affected all members of the bargaining unit. The respondent pointed out it frequently has to make trade-offs not only during negotiations but also during the administration of successive collective agreements. In conclusion, the respondent adopted the position that section 60 did not require sweeping egalitarianism, heroism and self-sacrifice but rather required representation which was not in bad faith and was neither arbitrary nor discriminatory.

18. The cases which were relied on by the respondent and referred to in paragraph three are not directly on point with the facts of this complaint. In the *Operative Plasterers' and Cement Masons' International Association, Local 48* case, *supra*, the complaint was formerly an officer in a trade union and was never an employee in a bargaining unit. The complainant, who was a member in good standing after his removal from office, had sought to be placed on his union's rostrum of members available for work at the trade. The Board in dismissing the complaint stated that it would do violence to section 60 if it presumed that members of a trade union who were affected by a union hiring hall were "employees in a bargaining unit" for the purposes of supervising the operation of that hiring hall through the union's alleged duty of fair representation. The Board notes this decision was decided before the enactment of section 60a. In the *Canadian Union of Public Employees, Local 1334* case, *supra*, a complainant was represented by a union for the purposes of collective bargaining. Negotiations for a new collective agreement commenced and a new collective agreement was signed. The new collective agreement provided that the rates should not apply to persons whose employment terminated between the date of the commencement of the new collective agreement and the date of the signing of the collective agreement. The complainant terminated his employment between these two dates and was therefore not entitled to the increase in wages which became effective while he was still an employee in the bargaining unit. The Board held that even assuming, without deciding, that the provision against retroactivity in the new collective agreement was a breach of section 60, such a breach of duty did not take place until the new collective agreement was signed. The Board dismissed the complaint because the complainant was not an employee in the bargaining unit at that time and was not entitled to rely on section 60. The third authority relied on by the respondent is the *United Brotherhood of Carpenters and Joiners of America: Carpenters' District Council of Toronto and Vicinity* case, *supra*. In that case a complainant sought to recover a claim for wages against an employer who signed a collective agreement with his union after he had terminated his employment. The Board dismissed the complaint and held that entering into a collective agreement while the employer owed money to a complainant was not a violation of section 60. The Board stated that in fact the union had believed that in signing the collective agreement the complainant would receive his wages.

19. Section 60 states:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith *in the representation of any of the employees in the unit*, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

(emphasis added)

The complainants were not employees in the bargaining unit at the time the alleged violation of section 60 occurred, that is to say, at the time of the execution of the current collective agreement. In addition, the complainants were not employees in the bargaining unit on the date of the filing of this complaint. However, the facts of the instant complaint are not the same as the facts in the cases referred to in the preceding paragraph. In the instant complaint, while none of the complainants had a vested interest in seasonal employment by the Corporation, the complainants have generally returned for seasonal employment with the Corporation as labourers. In practice the complainants contemplated an opportunity to work for the Corporation during their summer vacations in successive years. This state of affairs was known to the respondent. In the authorities cited by the respondent the complainants had either terminated their employment or had never been an employee of the employer in question. In the Board's view, section 60 does not appear to address itself to complaints by seasonal employees who happen to be no longer employees in a bargaining unit when an alleged violation of section 60 occurs. However, in view of the conclusion reached by the Board on the merits of this complaint it is unnecessary for the Board to decide the extent of the application of section 60.

20. Before analysing the facts of this complaint it is useful to consider some earlier decision of the Board which refer to the purpose and extent of section 60. In the *Canadian Union of Public Employees Local 1000 – Ontario Hydro Employees Union* case, [1975] OLRB Rep. May p. 444, at page 460, the Board stated:

Section 60 reflects one of the great paradoxes in industrial relations. As legislatures of modern industrial jurisdictions have come to sanction collective action to protect individual employees from all-powerful employers, a second need has arisen to protect individuals from the collective so sanctioned to act on their behalf.

The Board also stated again at page 462:

Bad faith and discrimination constitute the outer limits of majoritarianism and official action, preventing a trade union from singling out certain individuals for unfair treatment. This aspect of the duty is particularly important in discouraging discrimination on the basis of race, creed, colour, sex, etc., preventing internal trade union politics from erupting into forms of invidious conduct; and in prohibiting extreme forms of interpersonal breakdowns within a trade union. It is basic to a system based upon an exclusive bargaining agent. But as important as this subjective ill-will aspect of the duty is and as difficult as it may be to apply in some circumstances the most vexing and difficult application of the duty today is in giving meaning to the word "arbitrary".

The Board examined various approaches to a definition of the word "arbitrary" and expressed the view that "arbitrary" has some independent meaning beyond subjective ill will and recognized that such a view lacks precise parameters and is extremely difficult to apply. The Board recognized that a more precise definition has to distinguish arbitrariness from mere errors in judgment, mistakes, negligence and unbecoming laxness.

21. The complainants have stated that there are four issues before the Board. The first issue with respect to whether the grievors are employees in the bargaining unit has been dealt with in paragraph nineteen. The grievors are not employees in the bargaining unit. The second issue raised by the complainants alleges that they did not receive notice of the ratification of the proposed new collective agreement on April 16, 1978. The complainants also argue that the respondent has acted arbitrarily within the limits of its own procedure in merely posting the notice of the special meeting on the bulletin boards. The by-laws of the respondent set forth the notice to be given with respect to special meetings. The respondent not only complied with the requirements of its by-laws but allowed additional time beyond the requirement of twenty-four hours notice. In providing notice of the special meeting by posting on the bulletin boards, the respondent was following its established practice of thirty years. The respondent's conduct with respect to the giving of notice was the very antithesis of arbitrariness. As was stated in *The Municipality of Metropolitan Toronto* case [1978] OLRB Rep. Feb. p. 143, the Board does not seek to disturb a trade union's internal procedure except to the extent that those procedures may in themselves be arbitrary, discriminatory or in bad faith. The provisions of the respondent's by-laws with respect to notice are not arbitrary, discriminatory or in bad faith. The respondent has acted fairly and reasonably within the procedures it has established for itself.

22. On the third issue of whether the complainants have been denied to be heard, the Board is of the view that the complainants have been given opportunities to be heard. They have attended membership meetings and have had their points of view aired at such meetings. The respondent has acted upon the complainants' request to have negotiations re-opened with the Corporation.

23. In the fourth issue the complainants allege that the respondent was discriminatory and acted in bad faith in not regarding students as a legitimate classification of employee. The respondent negotiated a memorandum of settlement with the Corporation which included a differential in wages of forty-two cents an hour between the rate for a labourer and a student labourer. This settlement was reached over a period of several months. The inclusion of the differential in wages caused a split in both the negotiating committee and the membership. It is important to remember that the Corporation and not the respondent included such a differential in wages as part of its final offer. The merits of the memorandum of settlement were debated at the special meeting. It is all very well for the complainants to say that the respondent should exercise brinkmanship with the Corporation. As the Board noted in the *Canadian Union of Public Employees, Local 1749* case, [1976] OLRB Rep. Sept. p. 508, and in the *Ford Motor Company of Canada, Limited* case, [1973] OLRB Rep. Oct. p. 519, that in an effort to obtain the maximum benefits for its membership a trade union may be forced to make critical choices and trade-offs that may affect its membership unequally and that a trade union may be required to go so far as to abandon the interests of certain individual members. Trade-offs between trade unions and employers form the essence of collective bargaining. Trade unions frequently have to balance the interests of various groups within the bargaining unit, such as, for example, the skilled employee and the unskilled employee or the older employee and the younger employee when benefits are to be gained in improvements to the pension plan or the hourly rate. The Board is satisfied that the respondent has exerted equal effort on behalf of all classifications in the bargaining unit. The membership of the respondent does not act in bad faith and does not discriminate against students merely because it accepts a differential in wages between labourers and students and declines to go to the brink or beyond the brink of a strike or lockout.

24. As the Board noted in paragraph six, since 1970 there have been distinctions in the terms and conditions of employment between students and regular employees in a series of collective agreements. It appears that the respondent, the Corporation and, indeed, even the students have recognized that there are acceptable differences in the terms and conditions of employment of seasonal employees compared to regular employees. These differences are recognized in the laws of Ontario. The regulations enacted under *The Employment Standards Act, 1974*, define seasonal employee, provide that provisions with respect to public holidays do not apply to seasonal employees who in certain industries are provided with room and board and provide that overtime is to be paid for each hour worked in excess of fifty hours per week (as opposed to forty-four hours for other employees) and provide for a lower minimum wage for students under certain conditions. The negotiation and agreement of different terms and conditions of employment with respect to students and seasonal employees is not in itself a violation of section 60. To use the language of the Board in the *Canadian Union of Public Employees Local 1000 – Ontario Hydro Employees Union* case, *supra*, while the students have been singled out for different treatment they have not been singled out for unfair treatment. There is no evidence of invidious conduct by the respondent towards the complainants. The allegation that the respondent has violated section 60 is dismissed.

25. There remains for consideration the allegation that the respondent has also violated section 60a. Section 60a states:

Where, pursuant to a collective agreement, a trade union is engaged in the selection, referral, assignment, designation or scheduling of persons to employment, it shall not act in a manner that is arbitrary, discriminatory or in bad faith.

In our view this allegation is completely misconceived. There is not the slightest evidence that the respondent was engaged in the selection, referral, assignment, designation or scheduling of anyone to employment. Since the respondent was not engaged in this function it was clearly not in a position to act in a manner that was arbitrary, discriminatory or in bad faith. The allegation that the respondent has violated section 60a is also dismissed.

1656-78-JD United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada. (Complainant), v. **Ontario Hydro**; International Association of Bridge Structural and Ornamental Ironworkers, and Ironworkers Local 721; United Brotherhood of Carpenters and Joiners of America, Millwrights' Local 2309; and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, (Respondents).

Jurisdictional Dispute – Board deferring to impartial joint board although its processes may not be as expeditious and effective – Parties bound by collective agreement requiring reference to IJDB.

BEFORE: R. A. Furness, Vice-Chairman, and Board Members C. Ballentine and J. D. Bell.

DECISION OF R. A. FURNESS, VICE-CHAIRMAN AND BOARD MEMBER J. D. BELL; February 8, 1979

1. In a decision dated February 1, 1979 we held that the Board may be proscribed under section 81(14) from entertaining this request for a direction under section 81 of The Labour Relations Act and also held if the Board is required to entertain this complaint we postponed inquiry into this complaint pursuant to section 81(13). The reasons for our decision are now set forth.

2. The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (the "United Association") has requested the Board to issue a direction under section 81 with respect to certain work which is in dispute. Ontario Hydro and the International Association of Bridge, Structural and Ornamental Ironworkers and Ironworkers Local 721 (the "Ironworkers") object to the jurisdiction of the Board to entertain this complaint and rely upon the collective agreements between Ontario Hydro and the Ironworkers and between Ontario Hydro and the United Association and section 81(14). The United Association adopted the position that the Board had jurisdiction to entertain this complaint whereas Ontario Hydro and the Ironworkers adopted the position that this complaint should be heard by the Impartial Jurisdictional Disputes Board (the "IJDB"). The Ironworkers strongly adopted this position. Ontario Hydro, on the other hand, while not averse to having the Board entertain this complaint, desires to have this complaint heard once in the proper forum.

3. The two collective agreements each contain a similar article three. This article states:

Article 3

WORK ASSIGNMENT

- 3.1 The jurisdiction of the Union shall be that jurisdiction established by agreements between international unions claiming the work or decisions of record recognized by the AFL-CIO for the various classifications and the character of work performed, having regard

for the special requirements of thermal, nuclear or hydraulic generation and transmission and transformation construction.

- 3.2 Regular mark-up meetings will be conducted for each Project and for transmission and transformation construction at times appropriate to the work progress. The purpose of these mark-up meetings is to indicate to the Union the work which is planned to be carried out by Ontario Hydro in order to minimize the potential for jurisdictional disputes.

The Union will attend these mark-up meetings, and every effort will be made to settle questions of jurisdiction before the dates that Management indicates the work is expected to commence.

- 3.3 In the event that a jurisdictional dispute arises over a work assignment, the Employer will make an assignment for the work to be done. If any union or unions disagree with such a work assignment, the parties will settle such jurisdictional dispute in accordance with procedure as outlined by the Impartial Jurisdictional Disputes Board for the Construction Industry of the Building Trades Department, AFL-CIO.
- 3.4 In the event that a jurisdictional dispute cannot be settled on a local basis by the unions involved, it shall be submitted to the international unions involved for settlement without permitting it to interfere in any way with the progress of the work at any time. In the event the dispute is not settled by the international unions involved, it shall then be submitted to the Impartial Jurisdictional Disputes Board for resolution. (The International Representative of the Union will advise Ontario Hydro in writing of his intent to submit a jurisdictional dispute to the Impartial Jurisdictional Disputes Board and will identify in detail the work in question.) The decision of the Board will be final and binding to the parties to this Agreement. [The sentence enclosed in brackets does not appear in the United Association's collective agreement with Ontario Hydro.]
- 3.5 Ontario Hydro shall have direct recourse to the Impartial Jurisdictional Disputes Board when the Board has under its consideration a dispute involving the assignment of work being done by employees who are covered by this Agreement.
- 3.6 In the event that the Impartial Jurisdictional Disputes Board fails to render a decision within sixty (60) days of the disputed assignment, Ontario Hydro shall have recourse to the Ontario Labour Relations Board for a decision.

4. Ontario Hydro and the Ironworkers relied on the provisions of article three and section 81(14). The United Association referred to decisions in the *Adam Clark Company*

Limited case, 76 CLLC ¶16,053; the *Provincial Paper, Limited, Port Arthur Division* case, [1967] OLRB Rep. Oct. 672; the *Abitibi Paper Company Ltd. Sturgeon Falls Division* case, [1968] OLRB Rep. Aug. 507; the *Spruce Falls Power and Paper Company Limited* case, [1972] OLRB Rep. Sept. 836; and the *Canadian Johns - Manville Company Limited* case, [1974] OLRB Rep. Jan. 2. The United Association argued that the onus is on the person seeking to oust the Board's jurisdiction to establish that the Board does not have jurisdiction to entertain a complaint under section 81. The United Association also argued that the tribunal selected by the parties should provide a real and not an illusory method of resolving the complaint.

5. It was common ground among the parties that the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry (the "Plan") which established the IJDB remained in effect until May 31, 1978, with provision for renewal or termination of this Plan. There was no dispute that the Plan was terminated on May 31, 1978. However, there was no agreement between the parties concerning whether or when the Plan had been renewed. The United Association referred to several provisions of the Plan and argued that there was no evidence before the Board with respect to whether Ontario Hydro is an employer under article 1(a) thereof or whether Ontario Hydro had signed the stipulation setting forth that it is willing to subscribe to and be bound by the terms and the provisions of the Plan, or whether Ontario Hydro is able to participate in the Plan apart from the provisions of article 3.5 of the collective agreement.

6. Sections 81(13) and 81(14) of The Labour Relations Act state:

81(13) Where a trade union or a council of trade unions and an employer or an employers' organization have made an arrangement to resolve any differences between them arising from the assignment of work, the Board may, upon such terms and conditions as it may fix, postpone inquiring into a complaint under this section until the difference has been dealt with in accordance with such arrangement.

(14) The Board shall not inquire into a complaint made by a trade union, council of trade unions, employer or employers' organization that has entered into a collective agreement that contains a provision requiring the reference of any difference between them arising out of work assignment to a tribunal mutually selected by them with respect to any difference as to work assignment that can be resolved under the collective agreement, and such trade union, council of trade unions, employer or employers' organization shall do or abstain from doing anything required of it by the decision of such tribunal.

Section 81(14) proscribes the Board from inquiring into a complaint under section 81 where the conditions of that subsection have been complied with by the parties to the arrangement. Section 81(13) permits the Board to postpone inquiring into a complaint under section 81 where the conditions of that subsection have been complied with by such parties to the agreement. In the *Adam Clark Company Limited* case, *supra*, the Board held that section 81(14) did not prevent the Board from inquiring into a complaint where only one of two collective agreements entered into by the parties to a dispute referred such dispute to a tribunal other than the Board. The earlier decision in the *Canadian Johns - Manville Company*

Limited case, supra, was referred to by the United Association for the proposition that section 81(14) is to be strictly construed rather than widely construed as in the *Adam Clark Company Limited case, supra*. In our view the decision of the Board in the *Canadian Johns – Manville Company Limited case, supra*, dealt with the proposed implied inclusion of a term in a collective agreement because of the conduct of a parent trade union. In the latter case the Board declined to find merit in this argument, held that section 81(14) had no application and entertained the complaint before it. The Board in the *Canadian Johns-Manville Company Limited case, supra*, was not dealing with either the issue or the argument which was raised in the *Adam Clark Company Limited case, supra*.

7. The United Association argued that the Board should have proof that the Plan was in operation and that the Board should satisfy itself that the IJDB was in operation and that Ontario Hydro is an employer under the Plan before determining that the complaint should not be inquired into pursuant to section 81(14). In the *Spruce Falls Power and Paper Company Limited case, supra*, the Board was dealing with one collective agreement which was binding on two employers and three trade unions and determined that the collective agreement plainly provided for a tribunal which met the requirements of section 81(14). In the *Provincial Paper, Limited, Port Arthur Division case, supra*, and the *Abitibi Paper Company Ltd. Sturgeon Falls Division case, supra*, the Board was faced with a challenge to its jurisdiction similar to the instant complaint. In these two earlier cases, a tribunal to deal with jurisdictional disputes as envisaged in a collective agreement had apparently never been set up. Accordingly, the Board inquired into the complaints before it.

8. In the instant complaint the United Association is, in our view, asking the Board to enter into an inquiry on matters which are collateral to an inquiry under section 81 and to permit evidence to be called on such collateral matters. In our view, where the parties have mutually selected a tribunal as contemplated in section 81(14), they bear the responsibility of ensuring that they have entrusted their disputes to a viable entity. It is not the function of this Board to pass upon the constitution of the Plan and the ability of the IJDB to effectively perform the tasks which have been assigned to it by the parties. It is not the function of this Board to determine how the IJDB would regard Ontario Hydro. The question of onus does not arise in the circumstances of this preliminary objection to the jurisdiction of the Board. Once a tribunal has been established and mutually selected by the parties who have voluntarily agreed to refer their disputes to it, those parties ought to be required to first have recourse to that tribunal. The Board has residual jurisdiction under section 81. In the event that the IJDB is unable or unwilling to entertain this dispute or Ontario Hydro endeavours to proceed pursuant to article 3.6 of the collective agreements, section 81(14) may not apply to this complaint. In such circumstances the Board may have jurisdiction to entertain this complaint. In these circumstances, the Board postpones entering into the inquiry of this complaint pursuant to section 81(13).

DECISION OF BOARD MEMBER C. BALLENTINE:

1. I dissent.

2. While I agree that the parties have complied with the conditions set out in section 81(14), I am of the opinion that in the circumstances of this case, the Board should have heard the application on its merits.

3. This dispute first arose in October 1978. Since that time, the applicant has sought relief in accordance with the procedure set out in the collective agreements. Through no fault of its own it has encountered both delay and frustration. Moreover, there now exists disagreement amongst the parties as to whether the procedure adopted for the resolution of the dispute (the "Plan") which terminated on May 31, 1978 has been renewed. In these circumstances, I am of the view that it would be unreasonable to require the applicant to continue to seek relief in the manner provided for by the collective agreements.

4. On the basis of the foregoing, I would have dismissed the preliminary objection to the Board's jurisdiction.

1898-77-M Local Union 1788 of the International Brotherhood of Electrical Workers, (Applicant), v. **Ontario Hydro**, (Respondent).

Arbitration – Alleged unjust discharge – Board finding termination of incompetent employee proper.

BEFORE: Ian C. A. Springate, Vice-Chairman, and Board Members H. J. F. Ade and O. Hodges.

APPEARANCES: *S. B. D. Wahl and H. Scheuler for the applicant; R. Ross Dunsmore, Terry Edgar and Gerry Knight for the respondent.*

DECISION OF THE BOARD: February 8, 1979

1. This is a referral of a grievance to the Board pursuant to section 112a of The Labour Relations Act.

2. The grievance which is the subject matter of this referral alleges that the grievor, Mr. Roy Peltz, was unjustly terminated by the respondent on November 10, 1977. At all relevant times there was a collective agreement in operation between the applicant and the respondent which provided that any alleged unjustified termination or discharge could be grieved.

3. The grievor is a journeyman electrician. At the time of his termination he was employed on construction work at the respondent's Bruce Generating Station. Although the grievor did not testify at the hearing, we were informed that he is over sixty years old.

4. The grievor's termination was prompted by an accident which occurred on November 7, 1977. On that day the grievor and another electrician were engaged in attaching two conduits to a cable pan, a task which required the making of holes in the side of the pan. The cable pan itself carried a number of large heavy cables.

5. On the job site electricians are frequently called upon to perform work in close proximity to "live apparatus". Such apparatus is referred to as being "alive" because of its

capacity to deliver energy. Generally this capacity exists because the apparatus is connected to a source of electrical energy. The rule for electricians on the site is to assume that any apparatus is alive unless it is known for certain that it is not. The cables in the cable pan on which the grievor was working were in fact alive.

6. Three methods can be used to make a hole in the side of a cable pan while ensuring that no damage occurs to cables lying within the pan. The first is to use a punch-type tool to make the hole. It is agreed that no such tool was used in this case. The second possibility is to place a block of dry wood between the side of the cable pan and the cables and then to drill the hole. The third is to drill a hole after moving the cables far enough away from the side of the pan that they cannot be reached by the drill bit.

7. Mr. Barry Doak, the grievor's foreman, testified that he had advised the grievor and the other electrician doing the work that the cables in the cable pan were alive and that a block should be used when drilling the holes.

8. At the time of the accident the grievor was on an eight-foot ladder drilling a hole into the side of the cable pan. After piercing the cable pan the drill bit continued into a cable carrying 600 volts of electricity. This contact would have resulted in a bright flash. It is uncontested that the voltage involved was sufficient to kill a person. Fortunately, the grievor only suffered relatively minor burns to his hands and face. More serious injuries were averted by the fact that the grievor was using a double insulated drill.

9. The only person who could have given direct testimony concerning how the accident occurred was the grievor himself. However, as already noted, the grievor did not testify. From the fact that the accident occurred one can only assume that the grievor did not block the cables, and that if he did take any precautions they consisted solely of moving the cables away from the site of the pan. During a company investigation into the cause of the accident the grievor stated that while he had not blocked the cables he had moved them away from the side of the pan.

10. At the hearing counsel for the applicant contended that the Board should assume that the grievor had moved the cables a sufficient distance away from the side of the cable pan, but that vibrations in the pan caused by the drilling resulted in a cable moving back toward its original position. The difficulty with this contention is that the evidence indicates that because of the firm manner in which the cable pan was attached to support brackets, the drilling was not likely to cause any noticeable vibration. Further, even assuming that the pan did vibrate somewhat, because of the weight of each of the cables, it is unlikely that the vibration would have caused a cable to move any distance at all. Mr. Doak, the grievor's foreman, testified that in his experience this type of drilling does not cause any movement of the cables. Having regard to these considerations, and to the lack of any evidence to the contrary from the grievor, we are of the opinion that the drilling likely did not cause the cable to move. This being the case, we are left with only two possibilities, namely, that the grievor did not move the cable in question, or that he did move it but not far enough so as to put it out of reach of the drill bit once it pierced the side of the pan.

11. It was the contention of the respondent that the fact that the grievor was involved in the accident on November 7, 1977 was sufficient justification for his termination. In the alternative, it took the position that this accident, when considered in the light of certain

previous occurrences, justified his termination either on a disciplinary or non-disciplinary basis. For reasons which will be detailed later, counsel for the applicant objected to the introduction of any evidence related to the earlier occurrences. At the hearing the Board reserved on the applicant's objection and proceeded to hear the evidence.

12. The grievor was first employed by the respondent in November of 1974 and was transferred to the Bruce Generating Station site in September of 1975. Sometime in the fall of that year the grievor was assigned by his foreman, Mr. William Jack, to terminate some cables. The grievor, however, terminated one of the cables incorrectly by attaching some of the strands of the cable to one block and some to another. Later, on the basis of a memo from the grievor that the work had been completed and was ready for "bumping", some technicians energized the cable. This resulted in a short which caused some damage to the equipment. The grievor later indicated to Mr. Jack that he had not actually watched where he was attaching the cable. The grievor was not disciplined as a result of this occurrence but Mr. Jack did begin to assign him to more manually oriented work.

13. During or about March of 1976, the grievor was assigned to strap some de-energized cables into place above a motor control centre, a task which required that he stand on the control cable pan some fifteen feet above the floor. Three times that day Mr. Jack had to remind him to put on his safety belt. After the grievor had completed the work, he was advised by Mr. Jack that while the job as a whole was satisfactory he should have taken the cable around rather than through the centre of the cable pan. The grievor's response was to ask what cable pan he was referring to, to which Mr. Jack replied that it was the cable pan he was standing on. No disciplinary action was taken against the grievor at this time, although Mr. Jack and Mr. W. Zetzsche, the respondent's electrical general foreman, both talked to the grievor concerning the need for him to concentrate more on his work.

14. Not long after the incident referred to above the grievor was assigned to vacuum switch gears on a number of non-energized transformers. After spending some time on this task he stopped for a coffee break. After his coffee he headed towards a live transformer which he had not been assigned to work on. Fortunately, he was stopped prior to actually climbing onto the transformer. The evidence indicates that had the grievor climbed to the top of this particular transformer he would more than likely have been killed. The grievor was not disciplined as a result of this event but he was told by Mr. Jack that he could not long take any responsibility for the grievor's safety.

15. Following this episode, Mr. Jack discussed the grievor's situation with Mr. Zetzsche, the electrical general foreman. Mr. Zetzsche subsequently placed the grievor in a crew working under another foreman, Mr. Marcel Poulin. Mr. Poulin, who had not been advised of any of the previous incidents involving the grievor, assigned the grievor and a third year apprentice electrician to do some work utilizing a megger. As a result of certain comments made to him by the apprentice, Mr. Poulin had a talk with the grievor. At that time the grievor indicated that he had been holding two conductors connected to a 600 volt megger when he instructed the apprentice to turn the crank on the megger. The evidence led before the Board indicates that in such a situation a 600 volt megger is potentially harmful, although not likely to be fatal except to individuals with a heart problem. The grievor was not disciplined as a direct result of this incident.

16. In the month of April of 1976, the respondent began to lay off a number of elec-

tricians. Because of his seniority the grievor would not normally have been one of those to be laid off. However, at Mr. Zetzsche's suggestion both the grievor and his union steward agreed that the grievor should be laid off out of seniority. Mr. Zetzsche stated that he laid the grievor off at the time since he felt that there was no work available which he could safely perform.

17. In August of 1976, the respondent requested the applicant union to refer a number of electricians to the Bruce job site. One of those referred was the grievor. The grievor was at the time re-hired by the respondent. He was assigned to Mr. Doak's crew sometime in October of 1977. Mr. Doak testified that when he assigned tasks to the grievor, the grievor would at times return an hour or so later to ensure that he was in fact working on the job assigned to him. There is nothing to indicate that any actual safety problems were encountered with the grievor's work performance between August 1976 and the incident of November 7, 1977 when the grievor drilled into the cable.

18. Counsel for the applicant took the position that the incidents referred to above should not be taken into account since the grievor had not been disciplined for them and also because, in his view, when the grievor was re-hired in August of 1976 the company had condoned, and thus could no longer rely on, his work record prior to the time of his layoff.

19. Without getting into the issues related to the grievor's layoff and subsequent re-hire, we would note that if this were a simple matter of discipline we would be prepared to agree with applicant's counsel. As a general proposition past misdeeds which did not give rise to disciplinary action at the time they occurred cannot later be raised to support the degree of discipline imposed in response to some more recent event. See: *Re Owen Sound General and Marine Hospital and Ontario Nurses' Assoc.*, 14 LAC (2d) 192 (Abbott). The difficulty with simply applying this line of reasoning to the facts before us, however, is that there is raised in this case a real question concerning the safety of the work place and the possibility of future accidents.

20. The problems encountered by the grievor prior to his layoff arose due to a lack of proper attentiveness on his part. Although this lack of attentiveness seems not to have been regarded as a basis for discipline by the grievor's foremen, he was both spoken to concerning the need for attentiveness and also moved to less dangerous jobs. It is clear that both Mr. Jack and Mr. Poulin were primarily concerned with the safety implications of the grievor's work performance. It was because of Mr. Jack's refusal to be responsible for the grievor's safety that he was transferred to Mr. Poulin's crew. Similar concerns on Mr. Zetzsche's part led to the grievor being laid off out of seniority with the consent of both the grievor and his union steward. Thus, while the applicant is correct in its contention that these events did not result in the imposition of discipline, it cannot be said that the grievor was unaware of the seriousness with which members of management viewed the safety issues raised by his inattentiveness.

21. It is our view that where the presence of an employee on a job site creates a sufficiently great safety risk, an employer is not required to retain that employee. See: *Re University Hospital of London and London & District Building Service Workers' Union Local 220*, 4 LAC (2d) 16 (Simmons) and *Re Robertson Irwin Ltd. and International Association of Bridge, Structural and Ornamental Iron Workers, Local 734*, 6 LAC (2d) 410 (Brown). As both of these cases clearly indicate, a termination on this basis is not a matter of disciplining

an employee but rather of seeking to ensure a reasonably safe work place. In the *University Hospital* case, supra, the hospital terminated an employee upon discovering that some twelve years previously he had been convicted on several counts of arson. Medical evidence tendered before the arbitration board indicated that a risk existed that the grievor might at some future date give into an urge to set a fire. It was the decision of a majority of the board that because of the risks involved the hospital had been justified in terminating the employee. In the *Robertson Irwin* case, supra, the company terminated an employee upon discovering that he had a restricted field of vision. As part of his job the employee was required to operate a crane. The arbitration board concluded that even though the grievor had been adequately performing his work, because of the increased risk of an accident when the grievor was operating the crane the employer had been justified in terminating him.

22. Approached from this perspective, the issue before us is whether on November 10, 1977 a sufficiently great safety risk existed to justify the grievor's termination.

23. The fact that an employee commits a single error with serious safety consequences need not necessarily lead to a conclusion that the employee will be a greater than average safety risk in the future. For example, one might be satisfied that an error committed by an employee with an exemplary safety record was an isolated event not likely to be repeated in the future. In the instant case the grievor had not engaged in any unsafe conduct since being re-hired by the respondent in August of 1976. The length of time involved suggests that the grievor had to a large extent cured his propensity not to pay sufficient care to what he was doing. However, because of the incidents involving the grievor prior to his layoff in April of 1976, it is impossible to regard the accident of November 7, 1977 as a totally isolated event. Instead, the accident appears to indicate a lapse back to the inattentiveness which was the cause of the prior incidents. From this we are led to conclude that at the time of his termination a greater than average risk did exist that the grievor, through inattentiveness, might in the future create a situation dangerous to himself or to others.

24. In assessing the question as to whether the increased possibility of a dangerous accident being caused by inattentiveness on the grievor's part was a sufficient basis for his termination, we feel that the possible result of such an accident is a factor to be considered. In this regard see both the *University Hospital* and *Robertson Irwin* cases referred to above. Here, because of the nature of the work involved, an accident caused by inattentiveness might not only cause material damage, but may well result in serious injury or even death to the grievor or a fellow worker. Taking this into account, it is our view that the likelihood of the grievor's inattentiveness causing such an accident was sufficiently great to justify the respondent removing him from any potentially dangerous work.

25. It was the contention of counsel for the applicant that as an alternative to the respondent terminating the grievor it could have placed him on tasks which did not require him to work near live apparatus. The evidence, however, indicates that there was not a sufficient amount of this type of work available to reasonably constitute a separate job within the bargaining unit represented by the applicant. In these circumstances, we are satisfied that the respondent did have just cause to terminate the grievor.

26. The grievance is accordingly dismissed.

1591-78-R Division 1320, Amalgamated Transit Union, (Applicant), v. **City of Peterborough**, (Respondent), v. Canadian Union of Public Employees, Local 504, (Intervener).

Sale of a business – Reacquisition by city of municipal transit service formerly operated by franchise found to be a sale of business – Formerly unrepresented employees becoming an accretion to existing city office and clerical unit – No intermingling of other transit employees – Applicant’s bargaining rights preserved

BEFORE: M. G. Picher, Vice-Chairman, and Board Members W. H. Wightman and W. F. Rutherford

APPEARANCES: *Jim Fyshe, Arthur Burke and Cliff Vardy for the applicant; Murray Hynes for the respondent; H. Goldblatt, Jeff Egner, H. Wrightman, M. Ray and P. Turcotte for the intervener.*

DECISION OF THE BOARD; February 13, 1979

1. This is an application filed under section 55 of The Labour Relations Act. It arises out of a recent change in the operation of the public transit system in the City of Peterborough and an apparent conflict in the bargaining rights of the applicant (hereinafter referred to as the “Transit Union”) and the intervener union (hereinafter referred to as “CUPE”) that resulted from that change.

2. The facts are not in dispute. From the 1940’s until December 30, 1978 the public transit system in the City of Peterborough was operated on a franchise basis by a private company by the name of Border Transit Ltd. At all material times the Corporation of the City of Peterborough had the exclusive authority to permit the operation of a bus transportation system by franchise agreement with a private company (The Municipal Act R.S.O. 1970, c. 284, s. 354(1) ¶89) or to acquire the transportation facilities and equipment of such a company and undertake the operation of that system on its own (The Municipal Act, R.S.O. 1970, c. 284, s. 354(1) ¶90).

3. Until December 29, 1978 Border Transit Ltd. operated some 30 buses on ten regular routes as well as certain other special routes servicing industrial locations within the municipality. It employed, among others, some 38 drivers, 4 mechanics and 4 cleaners as of November, 1978, all of whom were represented for collective bargaining purposes by the Transit Union. In the summer of 1978, Border Transit Ltd. decided to get out of the business and served notice that it would not renew its franchise agreement which was due to expire on December 30, 1978.

4. The City then considered its options. It could look for a new franchisee or it could decide to operate the bus transit system itself. After inviting tenders from interested private parties and considering the merits of the tenders which were eventually filed it decided upon the second course. By Municipal By-Law 1978 – 168 the City of Peterborough enacted that it would operate the bus transportation system from and after December 30, 1978 and that for that purpose it would purchase the facilities and equipment of Border Transit Ltd.

5. The representations made to the Board establish that Border Transit Ltd. had operated, to a great extent, hand in glove with the City of Peterborough during its franchise. For a number of years the City leased a terminal building as well as part of a parking garage and waiting room to the franchisee. It also purchased and leased to Border Transit Ltd. at least 15 of the buses which it operated over the last 5 years as well as maintaining input into bus routes and fares. On November 14, 1978 the City entered into an agreement of purchase and sale whereby it acquired the vehicles, equipment and certain real property owned by Border Transit Ltd. On December 30, 1978 the transaction was complete and thereafter the City took over the premises, vehicles and equipment of Border Transit Ltd. as well as all of its employees and supervisory staff. On that day the same personnel continued to work providing the same services on the same routes using the same vehicles and equipment out of the same premises, but under a new employer.

6. The first issue is whether the sale of a business has occurred within the meaning of section 55 of the Act. In that regard section 55(1)(b) provides as follows:

55.-(1) In this section,

(b) "sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings.

7. The purpose of section 55 of the Act is to protect the rights of employees and their union when the business in which they are employed is transferred and continues under a new employer. Counsel for the intervener submitted that the facts describe the establishment of a new business by the City, placing considerable reliance in his argument on the word "establish" appearing in the enabling section of the Municipal Act and in the by-law authorizing the change-over. The Board must look, for the purposes of section 55 of the Act, to the substance and not merely to the form of the transaction which occurred. The fact is that the Corporation of the City of Peterborough took over the transit business as a going concern, including not only certain physical assets, but the staff that made them work. There was no interruption of service or substantial change in the nature of the business. In fact the City had a significant interest in the transit business prior to the transaction with Border Transit Ltd. as the licensor of the franchise and as the lessor of certain land and vehicles. It also had effective input in respect of routes and fares. On December 30, 1978 it merely acquired for itself those aspects of the business which had been the property and rights of Border Transit Ltd., including the services of all of the staff involved. The Board has no difficulty in concluding that there has in substance been, in the circumstances of this case, a transfer or disposition amounting to the sale of a business within the meaning of section 55 of The Labour Relations Act. (*Thorco Manufacturing Co.*, 65 CLLC 787). As a result the bargaining rights of the Transit Union continue in respect of the drivers, mechanics and cleaners concerned.

8. We turn now to the second issue in this case. CUPE holds bargaining rights for all service and maintenance employees as well as all office and clerical employees of the City through collective agreements between the City and CUPE locals 504 and 126 respectively. It is common ground that the office employees of Border Transit Ltd., a group of employees who were apparently not represented for collective bargaining purposes prior to the transfer of the business, became an accretion to the bargaining unit of office personnel employed by the City. CUPE local 504, which represents among others all drivers, mechanics

and cleaners employed by the City asserts a similar claim in respect of the drivers, mechanics and cleaners formerly employed by Border Transit Ltd. The Transit Union resists that claim on the basis of a presumptive right to the continuation of its bargaining rights by the operation of sections 55(2) and 55(3) of The Labour Relations Act.

9. In these proceedings the City has adopted a posture of resigned neutrality as regards the competing interests of the two unions. Counsel for the City did express the municipality's view that it might operate the transit system more efficiently if the drivers, mechanics and cleaners were included in a single bargaining unit with other city employees of the same classification, all represented by one union. But he did not strenuously support the position of either union and expressed the City's willingness to leave the ultimate determination to the Board.

10. Counsel for CUPE submits that section 55(6) should apply in these circumstances. That section allows the Board to constitute one or more bargaining units and assign them to one or more bargaining agents or unions where there has been an intermingling of employees in two previously separate bargaining units after the sale of a business. In this case, however, there has been no substantial intermingling of the former employees of Border Transit Ltd. and the employees of the City. It appears that prior to the closing of the sale certain maintenance employees of the City conducted a safety inspection of the vehicles that the City was going to acquire from Border Transit Ltd. That kind of inspection of goods prior to purchase is common in sales of this kind; the bringing on to the premises of Border Transit Ltd. of employees who were then employed by the City at a time prior to the sale of the business is not an intermingling of employees as contemplated by section 55(6) of the Act. That section is designed to resolve conflicts in bargaining rights when a group of employees who have been acquired in the purchase of a business are intermingled with other employees of the purchaser after the sale of the business. At the time of the hearing the two groups of employees concerned in this case were not merged to any extent. They continued to work at separate jobs with separate equipment at separate locations just as they had prior to the transfer of the business. There has not, in other words, been any intermingling of the employees that would trigger the operation of section 55(6) of the Act and any application in respect of that section is premature at this time.

11. Having regard to the facts the Board finds that section 55(4) of The Labour Relations Act applies in the circumstances of this case. That section provides as follows:

55 (4) Where a business was sold to a person and a trade union or council of trade unions was the bargaining agent of any of the employees in such business or a trade union or council of trade unions is the bargaining agent of the employees in any business carried on by the person to whom the business was sold, and,

- (a) any question arises as to what constitutes the like bargaining unit referred to in subsection 3; or
- (b) any person, trade union or council of trade unions claims that, by virtue of the operation of subsection 2 or 3, a conflict exists between the bargaining rights of the trade union or council of trade unions that represented the employees of the predecessor em-

ployer and the trade union or council of trade unions that represent the employees of the person to whom the business was sold,

the Board may, upon the application of any person, trade union or council of trade unions concerned,

- (c) define the composition of the like bargaining unit referred to in subsection 3 with such modification, if any, as the Board considers necessary; and
- (d) amend, to such extent as the Board considers necessary, any bargaining unit in any certificate issued to any trade union or any bargaining unit defined in any collective agreement.

12. In these proceedings CUPE claims that a conflict exists between its bargaining rights and those of the Transit Union as a result of the transfer of the bus transportation business to the City. That is obviously true. On the face of its collective agreements CUPE is, subject to certain exceptions not material to this case, the bargaining agent of all employees of the City of Peterborough. Its apparent right to thereby represent all bus transportation employees of the City thus directly conflicts with the pre-existing bargaining rights of the Transit Union. The issue is, therefore, whether the Board should amend the description of the bargaining units in the collective agreements of the Transit Workers and of CUPE and if so, just how the conflict should be resolved.

13. The consistent point of departure in the decisions of the Board in applications under section 55 of the Act is a recognition that the primary purpose of the section is the preservation of employees' bargaining rights upon the transfer of a business. The section protects employees of a transferred undertaking against automatically losing their union or seeing their bargaining rights transferred to a bargaining agent not of their choosing. Thus while the remedial scope of the section allows the Board to engage in an assessment of what is the appropriate bargaining unit the criteria to be applied are not identical to those which obtain in an application for certification of previously unrepresented employees. While the Board may have regard to all of the criteria that apply to that determination in certification proceedings it must also, having regard to the purpose of section 55, seek to balance the interests of the employees of the transferred undertaking and their union with the interests of both the employer purchasing the undertaking as well as the interests of that employer's existing employees and their union. In the fashioning or amending of bargaining units under section 55 of the Act the Board must give effect to existing bargaining rights to the extent that those rights can be reasonably accommodated within the new employer's administrative structures. (*Oshawa Wholesale Ltd.* [1965] OLRB Rep. Feb. 504; *The Corp. of the City of Kitchener* [1973] OLRB Rep. June 306; *Yarntex Perth, Division of Yarntex Corporation Ltd.* [1975] OLRB Rep. Feb. 137).

14. A particular concern in the determination of bargaining units under section 55 of The Labour Relations Act is that existing bargaining structures not lightly be interfered with. The Board recognizes the value of a bargaining unit that has developed through a succession of collective agreements. A bargaining structure with some substantial history to it often indicates a sound bargaining relationship. More often than not it has evolved through increased communication and has come to reflect a workable pattern of mutual expecta-

tions between union and employer. Since the promotion of sound collective bargaining relationships is what the Labour Relations Act is all about, the Board is understandably reluctant to dismantle a bargaining structure that has withstood the test of time.

15. In this case the evidence establishes that the drivers, mechanics and cleaners employed in the transportation service work in locations separate from the other employees of the City. They have a history of working together and bargaining together through the applicant. They share a separate community of interest from other City employees having regard both to the nature and the location of their work and to the cadre of immediate supervisors under whom they function. The employees in question are presently constituted as a sound and viable bargaining unit and there is no reason to believe that the continuation of the bargaining rights that they enjoy will unduly hamper the employer's operations. In these circumstances the Board sees no useful labour relations purpose to be served by destroying that bargaining unit in whole or in part. The Board therefore finds that the bargaining rights of the applicant should be preserved and that the scope of the bargaining unit of transit employees should continue as it was constituted under Border Transit Limited.

16. The Board hereby amends the bargaining units in the collective agreements between the Corporation of the City of Peterborough and CUPE: to the exclusions listed in article 1.2 of the collective agreement of CUPE local 504 and article 2.1 of the collective agreement of CUPE Local 126 the following exclusion is hereby added:

employees who are operators, mechanics, body men, greasers, cleaners, workers and servicemen employed in the public transit service and represented by Division 1320, Amalgamated Transit Union.

17. The Board shall remain seized of this application in the event of any disagreement between the parties respecting the interpretation or implementation of this decision.

1708-78-U John Vanderlinde, (Complainant), v. **Reid Aggregates Limited**, (Respondent), v. International Union of Operating Engineers, Local 793, (Intervener).

S-79 – Board finding that employee not dismissed because of pending application under section 39

BEFORE: E. Norris Davis, Vice-Chairman, and Board Members W. F. Rutherford and C. G. Bourne.

APPEARANCES: *Gerald Vandezande and Steven M. Cass for the complainant; Joseph F. Foreman and Harry Goodfellow for the respondent; B. Fishbein and P. Gauthier for the intervener.*

DECISION OF THE BOARD; February 27, 1979

1. This is a complaint made under section 79 of The Labour Relations Act alleging contraventions of sections 61 and 71 in the discharge of the complainant.
2. Counsel for the intervener took a preliminary objection that the Board should defer in this matter to the contract arbitration forum. The Board is of the view that the essence of the application is an allegation of a violation of The Labour Relations Act which is a matter to be properly determined by this Board.
3. Counsels for the intervener and the respondent also raised preliminary objections that the material filed, on its face did not disclose a *prima facie* case and should therefore be dismissed without a hearing. The Board reserved its ruling in this respect and proceeded to hear the evidence on which the Board will make its decision.
4. The complainant was hired as a loader-operator in October, 1972 and it is not disputed he made known to the respondent his inavailability for Sunday work because of religious beliefs and that condition was respected throughout his employment. In July 1978 the respondent acquired by purchase an adjacent gravel dock owned by Cope (Sarnia) Ltd. and by decision of this Board in file 1227-78-R issued on December 8, 1978 it was found pursuant to section 55(6)(d) of the Act that, inter alia, the complainant's employment fell within the existing collective agreement between the intervener (Local 793 I.U.O.E.) and Cope.
5. The complainant testified that he was approached by Bruce Knight, a Local 793 representative, in mid-September or October, 1978 and informed that as a result of Reid's purchase of Cope, that he was covered by the existing collective agreement and would have to join Local 793. Vanderlinde told Knight that before signing a card he wanted to read the Union Constitution to which Knight replied that Constitution would be given him only after joining and being accepted. On a second contact between Knight and Vanderlinde some two weeks later Vanderlinde told Knight his reason for wanting to see the Constitution was to satisfy himself that it was "grounded on God's word". Also in October, Harry Goodfellow, General Manager of Reid, asked Vanderlinde several times if he would sign up with Local 793 and he informed Goodfellow and the Dock Manager that "it was my belief I could not join Local 793". Vanderlinde states "Goodfellow did not know what to do so I looked for legal advice" because he did not agree with Local 793. As a consequence he contacted C.L.A.C., a trade union of which he was aware and in whose Constitution he did believe, and an organizing campaign by C.L.A.C. ensued culminating in an application for certification and the Board's decision of December 8, 1978 referred to above. Vanderlinde states he advised Sheldon, the Dock Manager that he had joined C.L.A.C. and Sheldon's response was "that's too bad because Goodfellow said don't let John do anything either way and now it is too late".
6. Following the December 8, 1978 Board decision Vanderlinde was again approached on December 19th by an official of Local 793 to sign up and was told that he had two weeks to do so although normal procedure was to allow only one week. Vanderlinde stated he said he would not sign because the Constitution was not based on God's word. Vanderlinde then contacted the Committee for Justice and Liberty in Toronto on December 20th and arranged to meet with its Executive Director, Gerald Vandezande, on December 23rd, in Chatham and it was there decided he would make an application under section 39 of the Act for a religious exemption. Vanderlinde states that during the discussion with

Vandezande he never informed Vandezande he was under two weeks notice from the union to make up his mind.

Vanderlinde states he merely told Vandezande about the C.L.A.C. case not going through. On December 22nd Vanderlinde informed Tim Sheldon, a part-owner of the respondent and David Sheldon, the Dock Manager together of the intention to file such an application with the Labour Board so the money would go to a charitable organization. Tim Sheldon is reported to have said "in that case you win" and Vanderlinde states he was quite pleased with the answer.

7. On December 27th, Vanderlinde again talked with the two Sheldons who told him they would like to see him join Local 793 to which he said "its not the money but my religious belief and I am going to go and file an application to the Labour Board".

8. On December 29th, Vanderlinde received in the mails, from Vandezande, a set of forms to initiate a section 39 application which he signed and returned to the Executive Director in Toronto that day.

9. On January 2, 1979 Goodfellow received a letter from Joe Mihalich, Area Supervisor for Local 793 stating:

"We have given the non-union employee ample time under the agreement to make application for membership. Since he has not done so, it leaves us no alternative other than to file a grievance under Article 2, Union Security, Section 24."

The evidence is clear that, at the time of writing this letter, the union had no knowledge of any kind that Vanderlinde was contemplating an application under section 39. It was on January 4, 1979 that Vanderlinde informed Knight of Local 793 of his action.

10. Goodfellow took the union's January 2, 1979 letter to legal counsel and as a result wrote a letter to Vanderlinde, dated January 3, 1979 and which he personally delivered to Vanderlinde at 10.00 a.m. on January 3, 1979. That letter sets out, in part,

"... Notice was received from Local 793 by our Company on January 2, 1979, a copy of which is enclosed, which reveals that because of your unwillingness to join the union, a grievance procedure is being filed against the Company. We are of the opinion we are bound by the Collective Agreement ... and we are bound to discharge you unless you join the Union. This is to put you on notice therefor that if you have become a member of the Union by Wednesday, January 3, 1979 that you will be, as of the end of that working day, terminated from your employment."

Goodfellow handed the letter to Vanderlinde who testifies that he showed Goodfellow a copy of a document which originated with his son some five years ago, and, who was employed by some unconnected employer in which the son was authorizing an equivalent amount to union dues to be deducted and sent to a charity in lieu of union dues, and that he told Goodfellow he would do the same thing through the Labour Board. Goodfellow read

that document and said "I don't know what this is all about". Goodfellow does not remember any reference to the Labour Board.

11. Subsequently in the afternoon of the same day Vanderlinde showed Sheldon, the Dock Manager, a copy of the section 39 application form and also showed him the letter he had received from Goodfellow. Vanderlinde gave Sheldon the name, address and phone with the request he give them to Goodfellow. Vanderlinde also phoned Goodfellow at home that evening to tell him it was important for him to contact the Executive Director of the Committee for Liberty and Justice to which Goodfellow responded, "I'll let my lawyer handle this case".

12. Vanderlinde also endeavoured to contact Local 793 that afternoon but was unsuccessful in doing so until January 4, 1979.

13. The question for the Board is whether the decision to discharge Vanderlinde on January 3, 1979 was in any way motivated by the application made by him to this Board on January 4, 1979 seeking a religious exemption under section 39 of the Act. In our view, the evidence establishes, and the respondent agrees, that Goodfellow and others were well aware of Vanderlinde's religious beliefs over a long period of time: it is also clear that, following receiving the letter of discharge on January 3rd Vanderlinde did show a copy of his section 39 application (which had not then been filed) to Sheldon, the respondent's Dock Manager. The evidence is contradictory as to whether Vanderlinde following receipt of the January 3, 1979 letter told Goodfellow that he was applying to the Labour Board but, in any event, it is clear that Goodfellow was not shown a copy of the application which was to be filed.

14. Goodfellow testified that the decision to discharge was made on January 2, 1979 in discussions with legal counsel as to how to deal with the letter from Local 793 and that decision was not related to anything other than the letter. Goodfellow testified, when asked the reason for termination, "I guess I was really forced to terminate since Vanderlinde didn't want to join Local 793 and I had no other place to go". Indeed, in cross-examination, Vanderlinde, when counsel for the respondent drew to his attention that the allegation of a violation of section 71 meant that he was terminated because he applied under section 39, replied "they were terminating me because of the grievance of the union" and in response to the further question, "but not because applying under section 39?" said "No", and later in his testimony, Vanderlinde stated, "I was terminated under pressure by the Union because the Union brought a grievance against the Company. That was the reason".

15. The Board has some sympathy for the complainant's position in that he is caught up in a problem of timing. The problem, however, was one which he could have controlled had he not been apparently oblivious to the time factor, to the extent that he did not mention to Vandezande, when discussing a possible application under section 39, that the union had given him a two week period to make up his mind.

16. The Board is satisfied that the then pending application of Vanderlinde under section 39 was not any part of the reason for his discharge and, on that ground, the complaint alleging a violation of section 71 must fail.

17. The complaint also alleged a violation of section 61 of the Act and the respondent

argues that the action taken by it was in compliance with provisions in the collective agreement which fall within the protection of section 38(1). The evidence establishes that there has been no threats from the Company to force Vanderlinde to join the union but rather in his words, "they pleaded with me to join". We are of the opinion that the action to discharge was taken solely in pursuance to the terms of the collective agreement, which terms are permitted under section 38.

18. The complaint alleging a contravention of section 61 is dismissed.
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1613-78-R Labourers' International Union of North America, Local 837, (Applicant), v. **V. Trigiani Contracting Ltd.** (Respondent), v. Group of Employees, (Objectors).

Charges – Practice & Procedure – Board declining to entertain untimely allegations of intimidation and coercion.

BEFORE: M. G. Picher, Vice-Chairman, and Board Members J. D. Bell and C. A. Ballentine.

APPEARANCES: *B. Fishbein and W. Mac Gregor for the applicant; P. Rusak and Vincent Trigiani for the respondent; Henry A. Winter for the objectors.*

DECISION OF THE BOARD; February 13, 1979

1. This is an application for certification within the meaning of section 108 of The Labour Relations Act.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.
3. Having regard to the provisions of section 6(1) of The Labour Relations Act, the Board further finds that all plasterers, plasterers' apprentices and construction labourers in the employ of the respondent in the County of Wentworth including part of Township of North Dumfries annexed from Beverly Township and the Township of Nassagaweya and the Town of Burlington in the County of Halton, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.
4. For the purposes of clarity, the Board declares that employees engaged in the taping of all drywall applications are included in the bargaining unit.
5. The hearing of this matter began in the morning of January 29, 1979. Because of insufficient information respecting the list of employees on the date of application the Board gave the respondent an adjournment to 2 p.m. to obtain the necessary information. At the resumption of the hearing after the lunch hour counsel for the respondent filed a letter alleg-

ing breaches of section 61 and 62 of The Labour Relations Act by the applicant. Counsel for the applicant objected to the introduction of charges at that point in the proceedings, arguing that it had insufficient notice. The union submitted that it would be prejudiced both by surprise and by a delay of its application if it must seek an adjournment to respond to the charges. Alternatively counsel for the union submitted that the charges lacked sufficient particularity.

6. Section 47 of the Board's Rules of Procedure provide as follows:

47.-(1) Where a person intends to allege, at the hearing on an application or complaint, improper or irregular conduct by any person, he shall,

- (a) include in the application or complaint; or
- (b) file a notice of intention that shall contain,

a concise statement of the material facts, actions and omissions upon which he intends to rely as constituting such improper or irregular conduct, including the time when and the place where the actions or omissions complained of occurred and the names of the persons who engaged in or committed them, but not the evidence by which the material facts, actions or omissions are to be proved, and, where he alleges that the improper or irregular conduct constitutes a violation of any provision of the Act, he shall include a reference to the section or sections of the Act containing such provision.

(2) Where, in the opinion of the Board, a person has not filed notice of intention promptly upon discovering the alleged improper or irregular conduct, he shall not adduce evidence at the hearing of the application of such facts, except with the consent of the Board and, if the Board deems it advisable to give such consent, it may do so upon such terms and conditions as it considers advisable.

(3) Where a statement in an application or complaint or in any document filed under these Rules in respect of the application or complaint is so indefinite or incomplete as to hamper any person in the preparation of his case, the Board may, upon the request of the person made promptly upon receipt of the application, complaint or document, direct that the information stated be made specific or complete and, if the person so directed fails to comply with the direction, the Board may strike the statement from the application, complaint or document.

(4) No person shall adduce evidence at the hearing of an application or complaint of any material fact that has not been included in the application or complaint or in any document filed under these Rules in respect of the application or complaint, except with the consent of the Board and, if the Board considers it advisable to give such consent, it may do so upon such terms and conditions as it considers advisable.

7. That section has a twofold purpose grounded in both legal considerations and in-

dustrial relations considerations. The legal consideration implicit in section 47 of the Board's Rules of Procedure is a recognition of the rule of natural justice that anyone charged with wrongdoing should have sufficient notice of the charge against him. The labour relations consideration is a recognition that the realties of union organization are such that a delay of Board proceedings may serve to defeat the union. A union may successfully defend charges made against it only to discover, upon the late granting of a certificate, that its support among the employees has substantially eroded because, for reasons often not fully understood by rank and file employees, it has failed to get certified promptly and commence immediately to bargain on their behalf. For that reason section 47 of the Board's Rules of Procedures seeks to strike a balance between natural justice and the avoidance of delay in certification proceedings or any other proceedings before the Board. In an application for certification both the interests of natural justice and industrial relations are best served when allegations of wrongdoing are made in sufficient time and with sufficient particularity that an applicant union is not prejudiced either by surprise or by being forced to seek adjournment and the delay of its own application. Therefore, where allegations against an applicant are not filed in a timely manner or with sufficient particularity the Board may refuse to entertain them. (*Fleck Manufacturing Limited* 62 CLLC ¶16,236; *Cable Tech Wire Company Limited* (as yet unreported) Board File No. 0297-78-R, June 21, 1978).

8. In this case the respondent sought to introduce allegations of breaches of the Act in mid-hearing on January 29, 1979. It was not argued on behalf of the respondent that it did not have knowledge of the acts alleged sufficiently in advance of the hearing to have given adequate notice to the applicant. In fact the respondent had formal notification of the date of the Board's hearing from the Registrar by notice dated January 22, 1979 and retained counsel on January 25, 1979. In those circumstances the Board is not satisfied that the respondent could not by the exercise of due diligence have given notice of the charges to the union at least several days prior to the hearing. We are therefore not satisfied that it should be permitted to do so in mid-hearing. Moreover, the charges do not contain sufficient particularity in that they do not specify the times and place of the acts alleged, as contemplated in section 47 of the Rules. For the foregoing reasons, having regard to the prejudice to the applicant if the charges were entertained at the hearing, the Board exercised its discretion pursuant to section 47(2) of the Rules of Procedure to decline to hear evidence in respect of the charges filed.

9. A statement of desire in opposition to the applicant and bearing the signature of a number of employees of the respondent was filed with the Board. Because the number of signatures upon it was sufficient to cause the Board to exercise its discretion to conduct a representation vote if it were found to be the free and voluntary expression of the employees who signed it the Board conducted its usual inquiry into the origination and circulation of the petition. Mr. Henry Winter, an employee of the respondent and signatory of the petition gave evidence in that regard. He testified that he did not know where the petition originated, but that he and three other employees signed it at the invitation of their employer, Mr. Trigiani. The evidence establishes that Mr. Trigiani approached the group of employees and told them that a petition against the union was on a table in the shop and that they could sign it if they wished. They all did. No other evidence was given in support of the petition.

10. It is well established that this Board can give little or no weight to a statement of desire purporting to be that of employees but in fact sponsored or substantially influenced by their employer. It is for that reason that the Board requires petitions of this kind to be

supported by clear and complete evidence respecting their origination and circulation. (See section 48 of the Board's Rules of Procedure). The standard of voluntariness is obviously not met where, as here, the Board has no evidence as to who originated the petition and only evidence the Board does have is that the petition was signed in circumstances that could only be construed by the employees as "an open invitation to proclaim their loyalty to their employer by signing the petition". (*Peel Block Co. Ltd.* (1963) 63 CLLC ¶16,277). In light of the evidence, therefore, the Board attaches no weight to the petition filed in opposition to this application.

11. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on January 17, 1979, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

12. A certificate will issue to the applicant.

0566-78-U Frederick Carl Vincent, (Complainant), v. United Steelworkers of America and **Walker Exhausts Limited**, (Respondents).

Duty of Fair Representation – S-79 – Employees engaging in wildcat strike – Grievor among those disciplined – Union settling outstanding grievances – No reason to believe grievor's case more likely to be successful than others – Union's decision not to proceed to arbitration held not to be arbitrary

BEFORE: Arthur L. Haladner, Vice-Chairman.

APPEARANCES: *David P. Olsen and Frederick Carl Vincent for the complainant; Brian Shell, M. Keck and C. Brannen for the United Steelworkers of America; B. R. Baldwin and J. C. Shantz for Walker Exhausts Limited.*

DECISION OF THE BOARD; February 23, 1979

1. The name: "United Steelworkers of America, Local 2894 and Walker Exhausts Limited (Galt Metal Industries Limited)" appearing in the style of cause of this complaint as the name of the respondents is amended to read: "United Steelworkers of America and Walker Exhausts Limited."

2. This is a complaint brought by Frederick Vincent in which he alleges that he has been dealt with by his union in a manner contrary to the provisions of section 60 of The La-

bour Relations Act. The parties were informed at the hearing of the Board's findings in this matter. What follows are the reasons for its decision.

3. The complainant is one of 43 employees of Walker Exhausts (formerly Galt Metal Industries) discharged as a result of their alleged participation in an illegal wildcat strike. These employees, all of whom filed grievances against their dismissals, were all rehired by the employer. The complainant, however, and nine others were reinstated subject to terms which included a year's assignment to general operations (incentive work). The other 33 were reinstated with five week suspensions. The disposition of the grievances was part of a negotiated settlement which resulted in the making of a new collective agreement between the union and the employer. The complainant alleges that the settlement was arbitrary insofar as it applied to him and requests the Board to direct the union to carry his grievance to arbitration.

4. At the time of the strike (April 14-20, 1977) the complainant, an electrician, was on suspension due to an arbitration award which had converted a previous disciplinary dismissal – for fighting with another employee – into a one-year suspension. The complainant's record includes a thirty-day suspension for engaging in an illegal strike as well as a number of other disciplinary offences. Prior to the suspension, which was to end on July 14, 1977, the complainant was employed in the employer's maintenance department.

5. On April 19, 1977, the union was advised that the complainant was being discharged because of his participation in the strike and his previous employment record. The union was told only that the complainant had been seen on the picket line which had been set up outside the plant and that the company was relying on the fourth disciplinary finding of the arbitrator, that "any further incident for which the G is in any way responsible during the period of suspension, this award of suspension shall be converted to discharge". The union was given no further information regarding the complainant's involvement in the strike; nor was it given the names of the individuals who were alleged to have witnessed his attendance on the picket line.

6. On April 27th, the complainant received from the company a letter confirming his dismissal. The next day, Frank Wadden, a staff representative for the union, wrote the following letter to Harvey McCulloch, the arbitrator in the complainant's discharge arbitration:

Herein is contained a copy of the discharge letter to Fred Vincent. By discussions with myself, Mr. Maurice Keck, and finally this action the Company is presumed to have discharged Fred Vincent on the basis of your ruling. The ruling pertained to physical altercations with other employees. There have been no incidents of this kind because Mr. Vincent has not been at work and will not return to work until the duration of the suspension stipulated in your award.

We would ask that you write the Company and require justification for their actions and, if necessary, reconvene the Board as their actions allegedly flow from your award.

On May 23rd, Wadden was informed that the arbitrator considered his award to have no

bearing on an alleged strike in which the complainant participated, and which occurred subsequent to his award, and that he was not prepared to write the employer or reconvene the board.

7. After writing to the arbitrator, Wadden made enquiries of a number of people in an effort to verify the complainant's account of the circumstances surrounding his dismissal. The complainant's story, which was repeated in his testimony before the Board, was that he had driven his car (a buick riviera) up to the plant entrance on April 15th with the intention of returning to Brian Comeau, a fellow employee, a toaster which he had offered to repair. Vincent stated that upon being informed by another employee that a wildcat was in progress, something of which he had not previously been aware, he immediately left and with one exception, did not go near the plant again. Vincent told both Wadden and the Board that he left because he was under suspension and subject to discharge if involved in further trouble. The one exception, which was communicated to Clayton Brannen, the union's president, but not to Wadden, occurred on April 18th. On that day, the complainant drove his car onto a field adjacent to the plant (not on company property) with the objective of observing a "ruckus" which he had heard would be occurring at the plant entrance. The complainant's explanation for this action was that he had nothing to do that day and his curiosity got the better of him. The complainant steadfastly maintained, however, that he did not on either of the days in question leave his car or participate in the picketing.

8. Wadden testified that none of the people he interviewed had seen Vincent on the picket line other than the time he claimed to have been returning the toaster. Wadden stated, however, that he had heard rumours that the complainant had been on the line more than he said. Dave Nunn, the vice-president of the union and a member of the negotiating committee, gave evidence that while he had no other information regarding the complainant's attendance on the line, he was definitely concerned that there might be something else. As stated, the union had been advised that the complainant's involvement in the picketing was the reason for his discharge. Nunn gave evidence, which was confirmed by the employer, that during the negotiations which preceded the signing of the memorandum of settlement (see paragraph 16) the union had again been advised that the complainant had been seen on the picket line, and further that the company had indicated it had pictures to prove that. Nunn also testified that he telephoned the complainant on the morning of April 14th (the first day of the strike) to advise that a wildcat was in progress and that in view of his situation – on suspension and subject to discharge – he should stay away from the plant. According to Nunn, the complainant replied that he would. Nunn testified further that on April 14th – before the incident with the toaster – he and Brannen saw Vincent outside the steelworkers hall and repeated the above admonition. This latter testimony was confirmed by Brannen who testified further that on April 14th he saw Vincent a second time – also before the toaster incident – and once more advised him to stay away. According to Brannen, the complainant replied, "that's good advice, you've told me before, and I'll take that advice".

9. At the hearing, the complainant acknowledged being told by Nunn not to go near the plant because there was a wildcat. He stated, however, that he was told this after he had already been there and found out. It should be recorded that to the extent the evidence of the complainant conflicts with the evidence of Brannen and Nunn, the Board accepts the evidence of the union officials. It should also be recorded that the complainant's account of the toaster incident was corroborated by Brian Comeau who wrote a letter stating he had

seen a car which he recognized as the complainant's pull up to the plant on April 15th, stop and then pull away and that upon his return from work he found that his toaster had been returned. This letter, which was solicited by Vincent on Wadden's request, was given to Wadden on June the 8th.

10. That day, the complainant completed and filed, with Wadden's assistance, a grievance alleging that he had been unjustly discharged. Wadden testified that the grievance, which was filed after the grievances of the other dismissed employees, was not filed earlier because it was hoped that the arbitrator would reconvene the arbitration and reinstate him. When that did not occur, the grievance was filed. The complainant does not allege that there was anything improper about the union waiting until after it had heard from the arbitrator before filing his grievance. Indeed, had the arbitrator acceded to the union's request, the complainant would have had the result he now seeks – an arbitration of his grievance.

11. The next event of significance occurred on June 16th. On that date, the union negotiating committee met with the company in the offices of the Ministry of Labour. At that meeting, which was held at the request of the Minister – in response to the request of the union for the appointment of an arbitrator – the company made the following proposal:

- 1) that it would take back 33 of the discharged employees with a thirty-day suspension on their records. There would be no back pay given and these people would have no recourse to arbitration, nor could the union negotiate with the company for any back pay or to have the suspension removed from their records.
- 2) Of the other ten people who were fired, the company would allow four to go to arbitration in an attempt to gain their jobs back, but the other six (including Vincent) would not be allowed to go to arbitration to recover their jobs.

In a letter to the membership dated January 17, 1977, the committee advised that it had rejected the proposal "because we will not accept any settlement which would deny even one of our members the right to have his grievance decided by arbitration".

12. On June 20th, the union held a meeting to inform the 43 dismissed employees that it had filed grievances on their behalf and was proceeding to arbitration with all of them. At that meeting, the employees were informed that the grievance of Earle Moss, which was regarded as a test case, would be dealt with first and that the union was attempting to have the Minister of Labour appoint an arbitrator to hear the remaining 42. It should be noted that these efforts, which were directed by the union's solicitor, Ian G. Scott, Q.C., were taken in response to what was acknowledged at the hearing as an attempt on the part of the company to prolong the arbitration process. The position of the company was that the grievances should be arbitrated individually in accordance with the procedures set out in the collective agreement, a result which Mr. Scott argued in his letter to the Minister would "render the arbitration process so expensive and so prolonged that it becomes totally ineffectual as an expeditious technique of dispute resolution". (The collective agreement provided for a panel of four arbitrators who, in the course of a proposed arbitration, were to be contacted each in turn and asked to serve. If a particular arbitrator was unavailable

within thirty days, the next arbitrator on the panel was to be contacted.) The difficulties inherent in the company's position appear to have been recognized by the Minister who appointed on July 25th Professor E. E. Palmer as arbitrator to hear and determine the grievances of the employees other than Earle Moss. In making the appointment the Minister stated:

I have given the matter careful consideration, and it appears to me that in the peculiar circumstances described in the correspondence, the provisions of the collective agreement cannot be met so as to permit the usual selection process to operate within the thirty-day time period stipulated in section 10.04 (b). Accordingly, I have determined that this is a proper case for the exercise of my discretion under section 37(4) of the Act.

13. The complainant was ejected from the June 20th meeting. He was ejected after he persisted in interrupting with the demand that his grievance be dealt with separately, on the ground, he said, that he was at the time of the strike, neither at work nor on the picket line. The evidence establishes that the complainant was ejected because his interruptions were preventing the other employees, none of whom had yet been reinstated, from asking questions. There can be no doubt, moreover, that the decision to remove the complainant, which was taken after he had been given an opportunity to state his position and which was concurred in by 42 of the 43 dischargees, was taken solely in the interests of preserving some semblance of order. George Nott, the only employee who opposed the complainant's ejection, told the Board that while he considered that the complainant might have been given a little more leeway, perhaps he should not have been. Even the complainant allowed that he was told prior to his removal to sit down and that he was out of order.

14. On July 4th the company agreed to take back 32 of the 42 employees still discharged (Clayton Brannen, the union president, had been reinstated shortly after the strike ended in order to maintain continuity with the union). These 32 employees were reinstated with ten-week suspensions and with the right to have their grievances decided by arbitration.

15. It should be emphasized that throughout the period in question (from the commencement of the strike in April until the memorandum of settlement was signed – on November 15th) the company was refusing to meet or talk with the union about the merits of any of the grievances. The position of the company was, moreover, that while it was prepared to arbitrate each grievance individually, it would not even discuss the grievances until it got to negotiations. James Shantz, the company's industrial relations manager, told the Board that these were difficult times and that the union was given no co-operation. He testified that questions were asked regarding the involvement of the 43 dismissed employees but that the company refused to answer them. Mr. Shantz testified further that in the past it was not the practice of the parties to bargain grievances in conjunction with a collective agreement.

16. Negotiations for the renewal of the collective agreement, which expired September 16, 1977, began in early September. As a result of these negotiations, which were conducted in an atmosphere of high tension, a memorandum of settlement was entered into on November 14, 1977. The settlement, which was ratified by the membership on November

16th by a vote of 240 to 70, provided that the discharges of the ten employees not previously reinstated would be converted into disciplinary suspensions without pay on condition that:

- 1) they would report for work on the first shift for assignment to work on December 1, 1977, and failing to do so any such employee would be terminated;
- 2) each would be assigned to general operations (incentive); and
- 3) each would not be eligible to bid (to request for transfer) until December 1, 1978.

In addition, it provided that the suspensions of the 32 employees previously reinstated would be reduced to five weeks. Under the terms of the settlement, the grievances of all 43 employees, including the applicant's were withdrawn as was a company claim for damages arising out of the work stoppage. Brannen testified that the settlement was regarded by the bargaining committee as a success, particularly inasmuch as it secured the revocation of the ten discharges then standing.

17. Although the complainant is asking the Board to vacate the terms of the settlement insofar as they apply to him, it should be emphasized that he did not before the settlement was agreed upon voice any objections to the manner in which the union was proposing to dispose of his grievance. The evidence establishes that at the ratification meeting, which the complainant attended, the membership was told that if the agreement was ratified the terms would stand and the right to go to arbitration for the ten discharges as well as for the other 32 who were then seeking retroactive pay would no longer exist. The evidence establishes, moreover, that after the settlement was explained, the membership was given an opportunity to read it and to ask questions.

18. The Board was informed that after the meeting the complainant shook the hand of each of the bargaining committee members and thanked them for getting him his job back. The complainant's objection to settlement, which was not communicated until after the settlement had been ratified was that his condition (the complainant is a diabetic) would prevent him from maintaining his job. The Board was informed that incentive work is more difficult than maintenance work owing to the greater physical effort required and that the complainant had indicated he would not last more than two months. As of the last date of hearing, which occurred almost ten months after his reinstatement, the complainant was still working although, he said, with extreme difficulty.

19. It is common ground that the complainant's case was not dealt with on an individual basis after June 8th, the date his grievance was filed. When questioned about this at the hearing, Brannen stated that he had discussed the complainant's situation with Maurice Keck, the steelworkers' international representative, who agreed with his assessment of the situation – that in view of his past record the complainant did not stand that great a chance of getting his job back at arbitration and that he would be in a better position if dealt with as part of a group. Both Nunn and Brannen indicated, however, that the decision to accept the complainant's reinstatement on the terms negotiated was not based on its opinion that his grievance would be unlikely to succeed and that the union would probably have done the same thing had it regarded the grievance as meritorious. As Nunn put it, the objective of

the union, which it accomplished, was to get all of the ten dismissed employees back to work. In his testimony before the Board, Brannen emphasized the fact that the company had refused to meet with the union to discuss the grievances and that it had refused to supply it with the information necessary for a proper investigation. Further, Brannen testified that the union was unable to understand why certain of the employees had been discharged and that there were others besides the complainant who had claimed not to have participated in the strike. These included all of the five negotiating committee members, none of whom participated in the work stoppage or the picketing.

20. The complainant does not allege that the union's conduct in this matter was discriminatory or in bad faith. The position of the complainant is that his grievance was dealt with in an arbitrary manner. Counsel noted that in evaluating the propriety of a union decision not to proceed to arbitration with respect to a particular grievance, the Board has stated that while there is no requirement to process through to arbitration every grievance which an individual employee wishes proceeded with, a union acts arbitrarily and thereby breaches its duty of fair representation if it fails to address itself to particulars of an employee's grievance and disposes of it without regard to its merits. (See *Antonio Melillo*, [1976] OLRB Rep. Oct. 613.) It is these requirements which counsel says have been neglected in the situation at hand. Counsel contends that the grievance of the complainant was settled without adequate investigation and without regard to its merits. The fact that the union's action was ratified by the membership is, counsel says, of no significance since the membership was not given an opportunity to consider the complainant's case on its individual merit. The vote, which was taken without the membership having been informed of the circumstances surrounding his dismissal, was, counsel says, a vote on the "package" contained in the memorandum of settlement, something which was not in accordance with the practice of the union in the past. Counsel also contended that the union breached its duty of fair representation in failing to inform the complainant prior to November 16th that his grievance was not proceeding to arbitration. The complainant was thus deprived, counsel says, of an opportunity to elaborate upon his position.

21. This is not a case of an individual grievance that has been abandoned – the situation in *Melillo*, supra. Here the union has settled during negotiations for a collective agreement the discharge grievances of a large number of employees on terms providing for the reinstatement of them all. In such circumstances a union is not required to consider in detail the merits of every grievance before it. What is required is that the union put its mind to the situation as a whole and engage in a process of decision-making which cannot be considered unreasonable or capricious.

22. That is not to say a union can disregard completely the merits of individual grievances. Where the available evidence indicates that a particular grievance is worthy of special consideration, the union may be found in breach of its duty if it fails to give such consideration. The qualification is inserted because there may be situations in which a union would be justified in not dealing separately with a grievance which appears particularly meritorious. The Board notes here the argument made by counsel for the union – that even if the settlement in this case could be regarded as negatively affecting the complainant, which was denied, it could be justified on the ground that it positively affected the bargaining unit as a whole. Counsel argued that in the absence of evidence that its conduct was motivated by bad faith or discriminatory considerations, a union can quite properly strike a bargain which benefits some of its members to the detriment of others. To hold otherwise

would, counsel argues, be to hamstring the collective bargaining process, a process based upon a system of exclusive representation.

23. The decision-making process of the union can be broken down into three components, each of which was alleged to have affected detrimentally the disposition of the complainant's grievance. First, there was the decision to request of the Minister the appointment of an arbitrator to deal with the grievances not then proceeding to arbitration. Second, there was the decision to attempt to negotiate a settlement of the grievances without resort to arbitration. Third, there was the decision to settle the grievances on the terms specified.

24. There was certainly nothing arbitrary about the union's request to the Minister. That request was made – presumably on the advice of counsel – in the interests of securing for the grievors the most expeditious and economical hearing possible.

25. The Board has already held in *Nick Bachi*, [1975] OLRB Rep. Dec. 919 that a procedure which ties grievance negotiations to the negotiation of a new collective agreement is not inherently arbitrary or unfair. Where, as here, the employer has attempted to prolong the arbitration process so as to prevent it from functioning effectively, a decision to negotiate is all the more defensible and does not require a past practice to support it. Nor does it require the consent of the grievors.

26. Turning now to the decision to settle the grievances, it should be emphasized that this decision, which was made after the union had been frustrated in its efforts to obtain from the company the information necessary for a realistic appraisal of the merits of each case, was taken in the face of a number of practical considerations, all of which argued against the arbitration route. In addition to the time and expense of taking to arbitration the grievances of all of the discharged employees, many of whom were known to the union to have participated in the work stoppage, there was the need to conclude a collective agreement with the company. It should be emphasized, moreover, that the decision to settle was not taken lightly. The union's original position, which it did not move from until it had secured from the company the agreement it sought – the revocation of all of the discharges – was that it would not accept a settlement which would deny even one of its members the right to have his grievance decided by arbitration. This despite the employer's insistence that the grievances be dealt with on an individual basis (and, until the Minister's appointment, by a different arbitrator) and in rejection of an earlier proposal by the company to settle the grievances on terms providing for the immediate reinstatement of 33 of the 42 employees then discharged. It was in this setting that the union relinquished, with the overwhelming approval of the membership, its right to have the grievances disposed of on their individual merits.

27. Counsel for the complainant does not allege that the settlement was in any general sense arbitrary. Counsel's position is that the complainant's grievance should have been left out of the settlement so that it could be taken to arbitration. Counsel contends that the union's failure to achieve this result was arbitrary since on the information then available, there was no reason to conclude that the complainant had participated in the work stoppage. Counsel argued that apart from the toaster incident, which, if the complainant's account had been accepted, would not have been grounds for dismissal, there was no evidence of any further involvement. The assumptions underlying this contention are that the complainant's grievance would likely have succeeded at arbitration whereas others would likely

have failed and/or that the complainant's interests were sacrificed in the interest of securing a group settlement.

28. The evidence before the Board does not indicate that the grievance of the complainant was of greater merit than any of the grievances of the other nine employees reinstated to general operations. Although Brannen and Nunn gave evidence that the complainant's grievance would probably have been included in the settlement in any event, i.e., even if it had appeared meritorious, it is clear from their testimony that at the time the settlement was entered into, the union was of the opinion that the complainant's grievance lacked merit and that its prospects for success at arbitration were not good. Whether or not the union was correct in that opinion is not for this Board to decide. The issue is whether it was an opinion which could reasonably have been arrived at in all of the circumstances of the case.

29. The complainant's explanation for attending at the company's premises on April 15th – that he was there only to return a toaster and that he knew nothing of the strike is, on the face of it, a rather unlikely one. It is, moreover, an explanation which could not have been given credence by the union. The union knew, as a result of its own efforts, that the complainant had been advised that very day, as well as on the day previous, that a wildcat was in progress; that he had been given on both those occasions explicit advice to stay away; and that he had stated he would. Seized with this knowledge and knowing that the complainant had been in the vicinity of the plant on April 18th, it is not surprising that the union was concerned about the extent of the complainant's involvement and that it did not take lightly the company's assertions that he had been seen and photographed on the picket line. While the union did not place emphasis upon the rumours it had heard, these rumours could not have served to lessen its concerns. The Board finds that when these concerns were considered together with the complainant's past pattern of misconduct, the union could reasonably have concluded, as it did, that his grievance would be unlikely to succeed at arbitration and, accordingly, that the settlement was to his personal advantage. That being the case, the union cannot be found to have acted arbitrarily in deciding to settle his grievance in the manner it did.

30. The Board does not agree that the complainant was deprived of an opportunity to elaborate upon his position. The complainant had such an opportunity – at the meeting at which the settlement was ratified, and he did not make his concerns known. Although it is clear from the evidence that the union knew the complainant to be a diabetic, it is equally clear that it did not appreciate that his condition would prevent him from maintaining his job. Nor does the Board consider that this result which, as indicated, has not in fact occurred, could have been foreseen.

31. The Board sees nothing arbitrary about the union's not informing the complainant prior to the ratification meeting that his grievance was not proceeding to arbitration. Until the memorandum of settlement was ratified, the union was proceeding to arbitration, and before that it did not know whether or what the settlement would be. A union is not required to specifically inform its members of the progress of a particular set of negotiations. In the instant case, such a requirement would, as argued by counsel for the union, have subjected the already beleaguered negotiating committee to unnecessary pressure from the membership, pressure which could have undermined the employer's confidence in its ability to negotiate. In any event, as already stated, the complainant did attend the ratification meeting of November 16th and did not voice any objections to the settlement. The evidence

indicates, moreover, that the complainant attended at the steelworkers hall almost every day following his discharge and that he knew as much about the negotiations as any of the other employees. Certainly there was no attempt to deceive him.

32. Before concluding, the Board wishes to state its view that had the settlement not provided for the complainant's reinstatement – as was the case in *Gebbie and Longmoore*, [1973] OLRB Rep. Oct. 519 – the union might well have been expected to have compared his situation with that of any employees reinstated to employment and to have weighed to the extent that was possible the merits of each. In such circumstances, a decision not to proceed to arbitration with a grievance which was perceived as particularly meritorious could only have been justified on the grounds that it was considered necessary for the benefit of the bargaining unit as a whole – assuming but without finding that such action is permissible. In the circumstances of this case, the Board finds that a comparison of grievances was not indicated.

33. The Board finds that the union acted in a responsible and effective manner in securing, without resort to arbitration, the reinstatement of all of the employees discharged by the employer. The Board finds that the complainant's grievance did not merit special consideration and that there was nothing arbitrary about the manner in which it was disposed of. The Board finds that the union's representation of the complainant was in no respect arbitrary and that its conduct reflected a sincere concern for his interests.

34. In so finding, the Board wishes to emphasize that the union (1) anticipated and attempted to prevent the complainant's discharge even before it occurred – by informing him of the work stoppage and advising him to stay away; (2) made immediate efforts upon learning of his discharge to secure his reinstatement by writing the arbitrator and requesting a re-opening of proceedings; (3) investigated, to the extent permitted by the employer, the circumstances surrounding his dismissal – by interviewing the complainant, making inquiries of others, and suggesting that he obtain from Comeau corroboration of his story; (4) sought confirmation of its opinion of the merits of the complainant's grievance before deciding to negotiate on his behalf. As indicated, the Board considers that in the circumstances of this case the union would have been justified in engaging in such negotiations irrespective of its view of those merits.

35. The grievance is therefore dismissed.

1219-78-R Windsor Raceway Union, Local 639 affiliated with Service Employees International Union AFL-CIO-CLC, (Applicant), v. **Windsor Raceway Holdings Limited**, (Respondent), v. Hotel and Restaurant Employees Union, Local 743, (Intervener).

Certification – Trade Union – Allegation that trade union constitution restricts membership and that subject employees are ineligible to join – Application dismissed

BEFORE: Rory F. Egan, Alternate Chairman, and Board Members H. J. F. Ade and O. Hodges.

APPEARANCES: *Joan F. Higgins, Ron Killen, Harry Hubert and Joseph Aggimenti for the applicant; Leonard P. Kavanaugh and Frank Kessel for the respondent; Tom Rees and Charlie Ireton for the intervener.*

DECISION OF RORY F. EGAN, ALTERNATE CHAIRMAN, AND BOARD MEMBER H. J. F. ADE; February 28, 1979

1. The name "Windsor Raceway Holdings, Windsor Raceway, Windsor, Ontario" appearing in the style of cause of this application as the name of the respondent is amended to read: "Windsor Raceway Holdings Limited".
2. The intervener proposed that this application be held in abeyance pending disposition by the Board of the intervener's request for reconsideration of a Board declaration of October 3, 1978 that the intervener no longer represented the employees in the bargaining unit with which we are here concerned. The Board denied the request.
3. This is an application for certification in which the applicant was advised by the Board that it would be required to satisfy the Board at the hearing that its organization is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.
4. The bargaining unit sought by the applicant comprises all employees in the maintenance department of the respondent with certain exceptions not presently relevant.
5. The respondent, in its reply, raised a further question. This has to do with the jurisdiction of the applicant under its constitution to accept the employees in the proposed bargaining unit into membership. The respondent's submission was as follows:

It is the respondent's understanding that the applicant was formed solely for the purpose of representing the pari-mutuel employees of the respondent who are employed on a seasonal basis and who are paid on a per program basis. To the best of the respondent's knowledge, the applicant does not represent any person other than such pari-mutuel employees. The employees in the subject bargaining unit are hourly rated and the majority are employed on a full-time basis, year round. Further, the employees in the subject bargaining unit perform maintenance and related functions in the course of their employment and do not perform any of the functions of the pari-mutuel employees. The respondent submits therefore that the objects of the ap-

plicant are not broad enough to embrace a bargaining unit of the nature of the subject bargaining unit. The respondent further submits that the applicant ought not to be certified as the bargaining agent of the employees in the subject bargaining unit and respectfully requests the Board to so find and to dismiss the application.

6. In dealing with the effect to be given to the provisions of union constitutions and bylaws dealing with membership, the Board, prior to the decision of the Supreme Court of Canada in *Metropolitan Life Insurance Company v. International Union of Operating Engineers, Local 796 et al*, 70 CLLC ¶14,008, 11 D.L.R. (3d) 336, employed a flexible approach in certification proceedings. This approach was adopted out of regard for the principle set out in section 3 of the Act to the effect that everyone is free to join a trade union of his choice, and because the Board took cognizance of the fact that many union constitutions had been drawn up by laymen and of the further fact that unions had often developed practices with respect to membership requirements which did not always comply strictly with the constitution.

7. The decision of the Board in the *Metropolitan Life Insurance* case (supra) is reported in 67 CLLC ¶16,026. The case concerned an application for certification by the International Union of Operating Engineers for a bargaining unit which included persons in classifications other than that of operating engineers. The employer objected on the grounds that the constitution of the applicant did not permit it to accept persons into membership who were not engineers.

8. The Board, in the above decision, pointed out the following policy statement which it had published dealing with the question of membership:

STATEMENT OF POLICY
by
Ontario Labour Relations Board

Application for Certification – Members

Upon an application for certification the Board will require the applicant to submit evidence that each employee said to be a member of the applicant has

- (1) applied for membership in the applicant, and
- (2) indicated his acceptance of membership and his assumption of the responsibilities of membership
 - (a) by paying to the applicant, on his own behalf, an amount of at least \$1.00 in respect of the prescribed initiation fee or monthly dues of the applicant, or
 - (b) by presenting himself for initiation or by taking the members' obligation, or by doing some other act which, in the opinion of the Board, is consistent with membership in the applicant.

9. The Board, in the *Metropolitan* case, found that the constitution of the applicant made it quite clear that a person who signed an application for membership and paid a dollar did not thereby become a member of the union within the meaning of the constitution. The Board, however, went on to say:

There is a long-standing policy of the Board under which, in deciding whether for purposes of section 79 of the Act a person is a member of an applicant union, the Board has set its own standard of membership and has not considered constitutions of applicant unions, except in the circumstances set out below.

One of those circumstances was where the constitution contained a clear-cut prohibition or express exclusion with respect to a certain class of persons. In such cases, the Board said, it would refuse to certify an applicant union if it sought to include that class of persons in the bargaining unit. If, on the other hand, there is no express exclusion, the Board said, it would not entertain an objection based upon the union's constitution. The policy, as it then existed, also determined that even in the face of an express exclusion in a union constitution, if there was proof of unequivocal past practices of admissions as members of persons coming within the exclusionary class, the interpretation placed on the constitution by the union's responsible officers would overcome the language of the constitution.

10. All of the reasons given by the Board in its decision in which, of course, certification was granted notwithstanding the constitutional limitations of the union concerned, were reviewed by the Supreme Court which concluded as follows:

It is clear that the Board had jurisdiction to enter on the inquiry and that the certificate which it granted was, on its face, one which the Board had jurisdiction to issue.

If the Board had addressed itself to the question whether fifty-five per cent of the employees were members of the Union within the meaning of s.7(3) of the *Act* its decision could not have been interfered with by the Court although it appeared that the Board in reaching it had erred in fact or in law or in both.

But it is clear from the reasons of the Board read as a whole and particularly from the excerpts therefrom which I have quoted above that the Board did not perform the task imposed upon it by s.7. Instead of asking itself the question set out in the preceding paragraph the Board embarked on an inquiry as to whether in regard to the requisite number of employees the following conditions had been fulfilled: (i) that the employee had applied for membership in the applicant, (ii) that the employee had indicated his acceptance of membership and his assumption of the responsibilities of membership by paying to the applicant, on his own behalf, at least one dollar in respect of the prescribed fees or dues, (iii) that the constitution of the applicant did not contain an express prohibition of the employee being admitted to membership and (iv) that the Union accorded to the employee full rights and privileges as a member. The reasons of the Board make it plain that on being satisfied that these four conditions had been fulfilled in regard to any

employee it would treat that employee as a member of the Union for purposes of certification even if it were plain from the terms of the Union's constitution and from the nature of the qualifications of, and the duties performed by, such employee that he was not, and indeed could not be, a member of the Union.

In proceeding in this manner the Board has failed to deal with the question remitted to it (i.e. whether the employees in question were members of the Union at the relevant date) and instead has decided a question which was not remitted to it (i.e. whether in regard to those employees there has been fulfilment of the conditions stated above).

11. The *Metropolitan Life* case resulted in the enactment of what is now section 92(4) of the Act which, in effect, codified the Board's prior practices. There was also inserted section 1(1)(j) which states:

1.-(1) In this Act,

(j) "member", when used with reference to a trade union, includes a person who,

(i) has applied for membership in the trade union, and

(ii) has paid to the trade union on his own behalf an amount of at least \$1 in respect of initiation fees or monthly dues of the trade union,

and "membership" has a corresponding meaning.

12. Section 92(4) provides:

Where the Board is satisfied that a trade union has an established practice of admitting persons to membership without regard to the eligibility requirements of its charter, constitution or by-laws, the Board, in determining whether a person is a member of a trade union, need not have regard for such eligibility requirements.

The section obviously does not relieve the Board of the requirement to ask itself the question set out by the Court in that case with respect to membership. It does, however, give the Board the discretion, in the circumstances set out in the section, to disregard constitutional eligibility requirements of the union in question.

13. In dealing with the application of section 92(4) of the Act, the Board stated in *Zeller's Limited*, [1970] OLRB Rep. Nov. 809:

The evidence of membership filed by the applicant in this case satisfied the requirements of section 1(1)(ga) of the Act. Where, as in this case, persons are claimed by the applicant as members and the evidence of membership satisfies the requirements of the Act, the Board assumes that the union has not violated its own charter, constitution or by-laws and therefore the Board

assumes that the union has the right to accept and has accepted such persons into membership under the provisions of its charter, constitution or by-laws. Of course, this assumption is rebuttable. If there is a challenge to the applicant's jurisdiction to take such persons into membership and such challenge is supported by evidence that casts serious doubt on the applicant's right under its charter, constitution or by-laws to take such persons into membership, the Board, pursuant to the provisions of section 77(4) of the Act, will require the union to prove that it has an established practice of admitting persons into membership without regard to the eligibility requirements of its charter, constitution or by-laws.

14. The evidence in the present case established that the applicant had been given voluntary recognition in 1971 as the bargaining agent for:

All Mutuel Department employees of the Employer exclusive of the Director of Mutuels, the Secretary of the Director of Mutuels, the Mutuel Manager or Managers, the Secretary or Secretaries of the Mutuel Manager or Managers, the Assistant Mutuel Manager or Managers, the Head Cashier, Floor Supervisors and the Dealer.

15. Prior to 1971 the employees in the above bargaining unit had been represented by Mutuel Employees Association, Local 528, Building Service Employees International Union which had been certified as bargaining agent for a similar bargaining unit at Toronto.

16. The evidence is that the employees of the respondent became dissatisfied with the kind of services they were getting from Local 528 and an application was made to the International for a charter. The Board was advised that a charter had been granted and what purports to be collective agreements containing a scope clause, the same as that set out in paragraph 14 hereof, have been entered into since that date between the applicant and the respondent.

17. The evidence is uncontradicted that neither Local 528 nor the applicant has ever admitted to membership any employees other than those in the Mutuel Departments of the respondent or the Toronto employer and that the present application represents the first time the applicant has sought to extend its membership to employees other than mutuel department employees.

18. The applicant produced to the Board a document entitled "Constitution and By-laws", a booklet prepared by the Service Employees International Union. There is provision in this printed booklet for the insertion of the number of the local union concerned, followed by the words "of the Service Employees International Union". The applicant's Local number 639 appears in the space provided on the front cover.

19. Article 1 of the Constitution and Bylaws states:

This organization shall be known as _____, Local _____ of the Service Employees International Union.

The booklet was presented as containing the constitution of the applicant.

20. Article II of the Constitution and Bylaws provides as follows:

Jurisdiction and Object

Section 1. This Local Union shall have such jurisdiction as granted and approved by the International Union in accordance with the International Constitution and Bylaws.

Section 2. The object of this Local Union shall be to develop a closer union and more complete organization of all wage earners under its jurisdiction, and to assist its members in obtaining adequate compensation for their labor and the general improvement of the conditions under which they work. It shall be the object and duty of this Local Union to organize its jurisdiction completely and fully. This Local Union shall, as an affiliate of the International Union, carry out all of the objects and purposes of the International Union.

21. The Board was advised by the applicant that it did not have the charter at the hearing. It further advised the Board that it had been informed by the President of the Local that he had filed the charter with the Board after its receipt from the International. It might be pointed out that it has long been the practice of the Board to return union charters as soon as they have served their evidentiary purpose. In any event, in view of the fact that the applicant had had short notice of the respondent's challenge to its jurisdiction, the Board inquired of the applicant if it required an adjournment for the purpose of producing the charter and any other evidence relative to the question of status and membership. The applicant elected to proceed with the hearing.

22. The applicant stated that it was unable to produce any evidence with respect to the charter and the jurisdiction conferred upon it by that instrument. Even if an assumption were to be made in favour of the jurisdiction of the applicant notwithstanding the absence of the charter, the evidence with respect to the confined scope of its membership and representation up to the date of application although not decisive, clearly invites the contrary inference that the jurisdiction granted by the International was limited to employees in the mutual departments. On the other hand, if it were to be assumed that the charter limited the jurisdiction and membership, the foregoing evidence is not such as to permit the Board to disregard the "eligibility requirements of its charter, constitution or bylaws" under section 92(4). Without the charter, however, the Board is unable to properly determine what jurisdiction was "granted and approved" by the International in accordance with the International's Constitution and Bylaws, and whether the employees concerned are members under the charter and constitution and bylaws.

23. The application is accordingly dismissed.

24. It might not be amiss to point out in the event that the applicant re-applies that the respondent, in its submissions, made reference to the fact that in its application the applicant described itself as being "affiliated" with Service Employees International Union rather than as being a Local of the International. In the *Hugh Carson Company Limited* case, [1967] OLRB Rep. Jan. 795, the Board pointed out that affiliation must be distinguished from the chartering of a new local by an existing trade union. In the latter case, the

new organization is formed, pursuant to an existing constitution. We would also point out that the document filed as a collective agreement described the applicant as "Windsor Raceway Union Local 639, Service Employees International Union", whereas Article 1 of the Constitution and Bylaws provides for the description of the Local concerned as being "Local _____, of the Service Employees International Union".

DECISION OF BOARD MEMBER O. HODGES:

I dissent for the following reasons:

1. In this application for certification, the employer has argued that certification should be denied because the persons claimed as members are ineligible to be members of the applicant under its charter or constitution, and that the jurisdiction of the applicant as defined by the charter from its parent international union prevents it from representing the employees in the proposed bargaining unit. The majority of the Board is not satisfied that the employees, who have applied for membership and paid at least \$1 to the applicant, are members of the applicant. I agree with the facts as set out in the majority decision, unless noted otherwise.

2. Section 7(1) of *The Labour Relations Act* directs the Board to ascertain "the number of employees in the unit who were *members* of the trade union" on the application for certification. Section 1(1)(j) defines "member" so as to "*include*" a person who has made application for membership and paid at least \$1.00 to the union. In my opinion, that subsection deems persons who have met the criteria to be members of a trade union for the purposes of the Act, including for the purpose of measuring the trade union's support under section 7(1). It is implied that the Board has authority to find other persons to be members, but the Board *must* find persons who meet those criteria to be members. This interpretation is reinforced by the fact that the subsection was apparently enacted in response to the Supreme Court of Canada's decision in *Metropolitan Life Insurance Co.*, *supra* which seems to direct the Board to interpret and apply union constitutions in deciding who is a member of a trade union. Section 1(1)(j) virtually duplicates the Board's old standard of membership, as set out in its policy statement, which was rejected by the Court. In my opinion, the introduction of that provision makes union constitutional provisions irrelevant if employees satisfy the statutory criteria. It was meant to overcome the problems created by the *Metropolitan Life* decision. The Board was left with the duty to ascertain the number of union members in the bargaining unit, and is free to find persons to be members who have not satisfied the criteria contained in section 1(1)(j). Section 92(4) was added to the statute at the same time in order to give legislative protection to the Board's policy of ignoring constitutional eligibility requirements when the union's practice warranted that which had been rejected by the Court. This was necessary because the *Metropolitan Life* decision would still otherwise require the Board to look at union constitutions in deciding whether persons who had not met the criteria in section 1(1)(j) were union members. The purposes of the Labour Relations Act are better served by this interpretation. The Preamble to the Act declares it to be in the public interest to encourage the practice and procedure of collective bargaining. This Board ought not to impose new obstacles to certification that are not necessary or mandated by the legislation. The Board should not disregard the statutory definition of "member", especially when this type of issue is raised by an employer whose interest in the constitution of an applicant union should be limited.

3. It cannot be disputed that more than 55% of the employees in the bargaining unit at the relevant times had satisfied the criteria of section 1(1)(j). There is no evidence that any of them have been denied membership in the union, in fact, and no employees have expressed any concern in that regard to the Board. I would have felt compelled to issue a certificate to the applicant, and would not have had regard to the union's constitution, because of my view of the meaning of the legislation. To take any other view, would be to unduly limit, in a technical way, the freedom to join the trade union of one's own choice declared in section 3 of the Act.

4. There is another view of the meaning of section 1(1)(j), which is that it sets out a *prima facie* test of membership. The onus, then, is on the persons opposing certification to establish that persons who satisfy section 1(1)(j) are precluded from being members by the union's constitution. If they do so, then the union must prove the practice required by section 92(4) in order to satisfy the Board as to membership. The few Board cases on the subject since *Metropolitan Life* was decided and the amendments were introduced seem to adopt that approach. This implies that the amendments were intended merely to justify the Board's policy as it existed prior to the *Metropolitan Life* decision. My view is that the proper application of that test to the facts of this case would result in certification.

5. In *Gayner and Oultram*, 54 CLLC para. 17,073, the Board first set out its policy that it will not certify a trade union as exclusive bargaining agent for a group of employees where some of those employees are not eligible for membership in the union under its constitution. This was said to be because the restrictions on membership in the applicant would result in the discharge of employees whom the union is required to represent if the union negotiated a collective agreement making membership in the union a condition of employment. In that case and in *The Ottawa Citizen*, 54 CLLC para. 17,076, the Board denied certification on the basis of evidence given by the representatives of the applicant that some of the persons in the bargaining unit were ineligible for membership in the union because the constitution barred their admission to membership.

6. The facts in *N.D. Applegate Ltd.*, [1963] OLRB Rep. May 104 are very similar to those before this Board. The union's constitution gave it jurisdiction over specified industries and stated that persons employed in those industries who fulfilled certain other conditions shall be eligible for membership. When the union applied to represent a group of employees in an industry not specified in the constitution's jurisdictional clause the Board said:

"While the constitution describes the applicant's jurisdiction and provides that persons employed in an industry under its jurisdiction shall be eligible for membership, the constitution does not in terms prohibit the union from representing employees in a retail grocery or from admitting them to membership. The applicant states, and its evidence indicates, that membership is held open to all persons in the bargaining unit and that the applicant's constitution is not being applied to prohibit this union from representing these persons in collective bargaining. There is no evidence that any of the persons affected by the constitutional provisions relating to eligibility for membership have been denied membership or have complained in any way about these provisions. On the evidence before us we are constrained to conclude that the argument raised by counsel for the respondent must fail."

The employer had challenged certification on the same basis as the employer does here. The Board reached the same result in *Aldershot Contractors*, [1965] OLRB Rep. June 170 noting that there was not an "express exclusion" in the constitution of any of the classifications of employees which the union sought to represent, although the constitution did not expressly assert jurisdiction over all of those classifications.

7. In addition to the parts of the Constitution and Bylaws set out in the majority's decision, it is necessary to look at Section 1 of Article III:
 "Any person of good moral character employed in any employment within the jurisdiction of this Union shall be eligible for membership."

8. It is clear that the Board would only uphold an objection to certification based on the eligibility provisions of a union's constitution if there was an express exclusion of some employees in the proposed bargaining unit, at the time of the *Metropolitan Life* decision. The Board noted, in that case, that there was a safeguard in any event, when it said "... that if it should subsequently come to light that employees in the bargaining unit are not being accorded full status as members of the union, then, naturally, the Board would have to review its decision in the particular case and would be obliged to take this into account in subsequent cases. However, the possibility that this may occur in the future is no ground, in our view, for withholding bargaining rights in any particular case." The Supreme Court of Canada was only dealing with a case where there was an express exclusion of certain employees in the bargaining unit and the Board had used the union's practice to disregard it. It did not deal with the Board's policy where there was no express exclusion. If the Court's words suggest that the Board must always satisfy itself that the employees are, in fact, members of the union, at common law, that result has been overcome by the addition of section 1(1)(j). The Board has reaffirmed its earlier approach in decisions made since the Supreme Court's ruling.

9. The Board places the onus on the employer to establish the existence of the express exclusion that is required. Shortly after the Supreme Court's decision in *Metropolitan Life*, the Board, in *Zeller's Limited*, [1970] OLRB Rep. 809, said

The evidence of membership filed by the applicant in this case satisfied the requirements of section 1(1)(ga) of the Act. Where, as in this case, persons are claimed by the applicant as members and the evidence of membership satisfies the requirements of the Act, the Board assumed that the union has not violated its own charter, constitution or by-laws and therefore the Board assumes that the union has the right to accept and has accepted such persons into membership under the provisions of its charter, constitution or by-laws. Of course, this assumption is rebuttable. If there is a challenge to the applicant's *jurisdiction* to take such persons into membership and such challenge is supported by evidence that casts serious doubt on the applicant's *right* under its charter, constitution or by-laws to take such persons into membership, the Board, pursuant to the provisions of section 77(4) of the Act, will require the union to prove that it has an established practice of admitting persons into membership without regard to the eligibility requirements of its charter, constitution or by-laws.

(emphasis added.)

And again the Board stated "that a mere allegation unsupported by probative evidence which will substantiate any such challenge will not be sufficient to rebut" the presumption with regard to eligibility. In *Temgo Inc.*, 1978 OLRB Rep. 953 the Board said that the issue was "whether there are any eligibility requirements in the applicant's charter, constitution or by-laws within the meaning of section 92(4) of The Labour Relations Act which would preclude the employees who are affected by this application from being admitted to membership." (emphasis added.)

10. The decision of the majority suggests that the Board must satisfy itself that the employees are, in fact, members of the union under the terms of its constitution and the provisions of the Act. That approach to the Union constitution is not in line with the Board's jurisprudence as set out above. The applicant claims that the employees it seeks to represent are members and has submitted evidence of membership which satisfied the requirements of the Act. I must assume that the union has the right to accept and has accepted such persons into membership and that the union has not violated its own charter, constitution or bylaws. I find that the respondent has not produced evidence which casts serious doubt on the applicant's *right* under its charter, constitution or by-laws to take such persons into membership. Hence, it is not necessary for the union to prove that it has an established practice of admitting persons into membership without regard to any constitutional eligibility requirements. There are no eligibility requirements which preclude the persons whom the applicant seeks to represent from becoming members.

11. The Constitution and Bylaws of Local 639 merely suggest that the local is probably guaranteed a specific jurisdiction by its charter, not that it is prohibited from representing employees outside of that jurisdiction. Note that Article II, Section I is permissive, not restrictive. There is insufficient evidence to conclude that the union's guaranteed jurisdiction consists of *pari-mutuel* employees alone. This Board should not assume that it is so. The fact that the union has not yet represented other employees is equally consistent with the conclusion that this is a young, small local union lacking in resources, which has made it its first priority to represent its original constituents. This may be the first realistic opportunity it has had to organize other employees at the Raceway. There is no provision in the Constitution which expressly precludes employees beyond the union's guaranteed jurisdiction from becoming members of the union and no evidence that any of the persons whom the applicant seeks to represent have, in fact, been denied membership in this local. Note again that Article III Section I guarantees membership eligibility to certain persons, but is not restrictive. It is highly unlikely that the local's charter has another membership clause in it. Charters usually merely confer jurisdiction and grant authority from a parent union to a local. There is no eligibility requirement in the constitution which the persons whom the applicant seeks to represent cannot meet, which the Board seems to require in order to deny certification in a case such as this. The words of this Board in the *N.D. Applegate* and *Metropolitan Life* decisions set out above are applicable to these facts.

12. Any constitutional limitation on the jurisdiction of the applicant to represent certain types of employees is a matter of internal union affairs which this Board should not interfere with. If the Board is to look into such matters the same onus should apply to the employer on that issue as applies with regards to eligibility requirements in a union constitution. (See *N.D. Applegate Ltd.*, *supra*). Here, there is no evidence of any objection to this application being raised by the parent international union, and it is difficult to see how the enforcement of any division of jurisdiction between locals of a parent union is of any concern to the employer.

13. I would have certified the applicant.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JANUARY 1979

BARGAINING AGENTS CERTIFIED DURING JANUARY

No Vote Conducted

0263-78-R: Amalgamated Meat Cutters & Butcher Workmen of North America, AFL, CIO, CLC (Applicant) v. Levine Bros. Hides (Ontario) Limited (Respondent).

Unit: "all employees of the respondent at Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and sales staff." (90 employees in the unit). (*Having regard to the agreement of the parties*).

0600-78-R: United Electrical, Radio and Machine Workers of America (UE) (Applicant) v. Wilkinson Foundry Facing and Supply Company, Limited (Respondent).

Unit: "All employees of the respondent company in Metropolitan Toronto, save and except supervisors, those above the rank of supervisor and office and sales staff." (20 employees in the unit). (*clarity note* – see Report of full decision (1979) OLRB Rep. January).

0748-78-R: Canadian Union of Public Employees (Applicant) v. United Appeal Services of Sault Ste. Marie (Respondent).

Unit: "all office, clerical and technical employees of the respondent in the City of Sault Ste. Marie, save and except the office manager, persons above the rank of office manager, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (5 employees in the unit).

0764-78-R: Ontario Nurses' Association (Applicant) v. Peel Manor Home for the Aged, Regional Municipality of Peel (Respondent).

Unit #1: "all registered and graduate nurses employed in a nursing capacity at Peel Manor Home for the Aged, Regional Municipality of Peel, Brampton, save and except the Director of Nursing, those above the rank of Director of Nursing and those persons regularly employed for not more than twenty-four hours per week." (9 employees in the unit).

Unit #2: "all registered and graduate nurses regularly employed for not more than twenty-four hours per week in a nursing capacity at Peel Manor Home for the Aged, Regional Municipality of Peel, Brampton, save and except Director of Nursing, and those above the rank of Director of Nursing." (4 employees in the unit).

1232-78-R: Ontario Nurses' Association (Applicant) v. Queensway-Carleton Hospital (Respondent).

Unit #2: "all registered and graduate nurses engaged in a nursing capacity regularly employed for not more than twenty-four hours per week by Queensway-Carleton Hospital, Ottawa, save and except assistant co-ordinator and persons above the rank of assistant co-ordinator." (107 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note* – see Report of full decision

(1979) OLRB Rep. January). (*Bargaining Unit #1 – See Application Certified Subsequent to Post-Hearing Vote*).

1251-78-R: Graphic Arts International Union, Local 35P, Toronto, Ontario (Applicant) v. PR Graphics Limited (Respondent).

Unit: “all photoengravers and apprentices in the employ of the respondent in the City of Mississauga, save and except manager, persons above the rank of manager and artists.” (6 employees in the unit).

1270-78-R: Canadian Union of Operating Engineers, and General Workers (Applicant) v. A E S Data Limited (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the Respondent at its Mississauga Plant save and except engineering support and development staff, employees of the Research and Development Division, supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week, and students employed during the summer vacation period or in accordance with a recognized students co-operative program.” (92 employees in the unit). (*Having regard to the agreement of the parties*).

1365-78-R: United Steelworkers of America (Applicant) v. Condor Tool & Machine Incorporated (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent company in Stoney Creek, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff.” (11 employees in the unit). (*Having regard to the agreement of the parties*).

1370-78-R: Graphic Arts International Union, Local 35P Toronto, Ontario (Applicant) v. P. R. Graphics Limited (Respondent).

Unit: “all employees of the respondent in the City of Mississauga, save and except manager, persons above the rank of manager, office and sales staff, and photoengravers and apprentices.” (2 employees in the unit). (*Having regard to the agreement of the parties*).

1397-78-R: Service Employees Union, Local 204, affiliated with A.F. of L., C.I.O., C.L.C. (Applicant) v. Ballycliffe Lodge Limited (Respondent).

Unit: “all employees of Ballycliffe Lodge Limited in Ajax, Ontario, save and except professional medical staff, registered nurses, graduate nurses and undergraduate nurses, physiotherapists, occupational therapists, supervisors, persons above the rank of supervisor, office staff and persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period.” (70 employees in the unit). (*Having regard to the agreement of the parties*).

1443-78-R: Service Employees Union, Local 204 Affiliated with A.F. of L., C.I.O., C.L.C. (Applicant) v. White Eagle Nursing Homes Limited (Respondent).

Unit: “all employees of White Eagle Nursing Homes in Metropolitan Toronto, Ontario, who are regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except professional nursing staff, physiotherapists, supervisors, persons above the rank of supervisor, office staff and persons covered by a subsisting collective agreement.” (9 employees in the unit). (*Having regard to the agreement of the parties*).

1518-78-R: Labourers' International Union of North America, Local 506 (Applicant) v. Maher Construction (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario employed on building projects, except residential building projects, but including labourers employed as helpers of bricklayers and plasterers, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in the unit).

1523-78-R: The Ontario Acoustical and Drywall District Council, United Brotherhood of Carpenters and Joiners of America on behalf of its affiliated Local Unions 785, 1316, 1617 and 2041 (Applicant) v. Integrated Lighting Canada Limited (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, engaged in the installation and erection of acoustical and drywall systems, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in the unit). (*clarity note* – see Report of full decision (1979) OLRB Rep. January).

1535-78-R: Labourers' International Union of North America, Local 183 (Applicant) v. Camp Forming Ltd. (Respondent).

Unit: "all employees of the respondent engaged in concrete forming on residential building projects in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (9 employees in the unit).

1536-78-R: United Brotherhood of Carpenters Local #494 (Applicant) v. Antella Developments Enterprises Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

1538-78-R: Service Employees Union, Local 204 Affiliated with A.F. of L., C.I.O., C.L.C. (Applicant) v. Rosebank Convalescent Home (Respondent).

Unit # 1: "all employees of the respondent at Pickering, Ontario, save and except professional medical staff, registered nurses, graduate nurses, physiotherapists, occupational therapist, supervisors, persons above the rank of supervisor, office staff, persons employed not more than twenty-four (24) hours per week and students employed during the school vacation period." (60 employees in the unit).

Unit # 2: "all persons employed by the respondent at Pickering, Ontario, for not more than 24 hours per week and all students employed during the school vacation period." (42 employees in the unit).

1539-78-R: Ontario Nurses' Association (Applicant) v. Prince Edward County Memorial Hospital (Respondent).

Unit: "all registered and graduate nurses employed by the respondent in a nursing capacity at Pic-

ton, save and except nursing supervisors, persons above the rank of nursing supervisor and persons regularly employed for not more than 24 hours per week". (45 employees in the unit). (*Having regard to the agreement of the parties*).

1541-78-R: United Steelworkers of America (Applicant) v. McEwan Tougard Industries Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in the Town of Bracebridge save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (41 employees in the unit). (*Having regard to the agreement of the parties*).

1544-78-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the Township of Marathon (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the Public Works Department of the respondent save and except foremen, those above the rank of foreman, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (42 employees in the unit). (*Having regard to the agreement of the parties*).

1553-78-R: United Brotherhood of Carpenters & Joiners of America Local Union 1669 (Applicant) v. W. A. Stephenson Construction Co. Ltd. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the District of Thunder Bay, save and except non-working foremen and persons above the rank of non-working foreman." (21 employees in the unit).

1564-78-R: United Brotherhood of Carpenters and Joiners of America (Applicant) v. Converta Wall Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Townships of Elizabethtown, Augusta, and Edwardsburgh and all lands south thereof (there are three Municipalities south of these townships: Brockville, Prescott and Cardinal) in the United Counties of Leeds and Grenville, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

1574-78-R: International Brotherhood of Painters and Allied Trades – Local 1904 (Applicant) v. Elliot Rubber and Plastics Limited (Respondent).

Unit: "all employees of the respondent at Sudbury, save and except foremen, persons above the rank of foreman, office and sales staff." (26 employees in the unit). (*Having regard to the agreement of the parties*).

1575-78-R: Canadian Chemical Workers Union (Applicant) v. Prescott Machine & Welding Inc. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at its facility in Granville County, save and except foremen, persons above the rank of foreman, office and sales staff." (35 employees in the unit).

1577-78-R: Service Employees Union, Local 204, Affiliated with A.F. of L., C.I.O. C.L.C. (Applicant) v. Kennedy Lodge Nursing Home (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except professional nursing staff, physiotherapists, occupational therapists, supervisors, office staff and persons covered by subsisting collective agreements." (78 employees in the unit). (*Having regard to the agreement of the parties*).

1582-78-R: Canadian Union of Public Employees (Applicant) v. Jewish Community Centre of Toronto (Respondent).

Unit: "all service and maintenance employees of the respondent at its Northern Branch save and except Executive Director, Assistant Executive Director, Branch Manager, Program Director, Plant Manager, Comptroller, Nursery School Director, Camp Coordinator, Membership Secretary, Men's Health Club Supervisor, Secretary to the Executive Director, Secretary to the Branch Manager, Athletic Director, Group Services Supervisor, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and persons covered by subsisting certificate between the respondent and the applicant dated the 1st day of December, 1978." (18 employees in the unit). (*Having regard to the agreement of the parties*).

1596-78-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Lyric Furniture Limited (Respondent).

Unit: "all employees of the respondent at Cornwall, Ontario, save and except foremen, those above the rank of foreman, office and sales staff." (29 employees in the unit). (*Having regard to the agreement of the parties*).

1609-78-R: Christian Labour Association of Canada (Applicant) v. Winton Building Services, Inc. (Respondent).

Unit: "all labourers, plumbers, plumbers' apprentices and all persons engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same in the employ of the respondent in the County of Lambton, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit). (*Having regard to the foregoing*).

1617-78-R: Canadian Union of Public Employees (Applicant) v. Peace Bridge Area Association for the Mentally Retarded (Respondent).

Unit: "all employees of the respondent in Fort Erie, save and except supervisors, persons above the rank of supervisor, executive secretary to the executive director and assistant treasurer." (18 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note* – see Report of full decision (1979) OLRB Rep. January).

1619-78-R: International Union of Operating Engineers, Local 793 (Applicant) v. Di Domizio Construction Ltd. (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

1649-78-R: Retail Clerks Union, Local 486 Chartered by the Retail Clerks International Union (Applicant) v. Robert Michaud (78) Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Belleville, save and except the Secretary-Treasurer, and persons above the rank of Secretary-Treasurer." (16 employees in the unit). (*Having regard to the agreement of the parties*).

1653-78-R: Labourers' International Union of North America, Local 183 (Applicant) v. Markview Homes Inc. (Respondent).

Unit: "all construction labourers employed by the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario on residential construction, save and except construction labourers employed as helpers of bricklayers and plasterers, salaried repairmen, non-working foremen and persons above the rank of non-working foreman." (13 employees in the unit). (*Having regard to the representations of the parties*).

1654-78-R: United Steelworkers of America (Applicant) v. Marsh Engineering Limited (Respondent).

Unit: "all employees of the respondent in the Municipality of Nanticoke, save and except foremen, persons above the rank of foreman, office and sales staff." (3 employees in the unit). (*Having regard to the agreement of the parties*).

1655-78-R: Bakery, Confectionery and Tobacco Workers Staff Union (Applicant) v. Bakery, Confectionery & Tobacco Workers' International Union Local 264 (Respondent).

Unit: "all full-time union representatives employed by the respondent in Metropolitan Toronto, save and except Business Manager and clerical staff." (2 employees in the unit). (*Having regard to the agreement of the parties*).

1672-78-R: United Brotherhood of Carpenters and Joiners of America Local Union 93 (Applicant) v. Span Design & Construction Ltd. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (10 employees in the unit).

1673-78-R: Labourers' International Union of North America Local 183 (Applicant) v. Rivercove Developments Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed as helpers of bricklayers and plasterers, non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

1681-78-R: Retail Clerks Union, Local 206, Chartered by the Retail Clerks International Union (Applicant) v. Fine Papers London (Respondent).

Unit #1: "all employees of the respondent at London, save and except foremen, those above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per

week and students employed during the school vacation period.” (26 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: “all employees of the respondent in London, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except foremen, those above the rank of foreman, office and sales staff.” (2 employees in the unit). (*Having regard to the further agreement of the parties*).

1682-78-R: Retail Clerks Union, Local 206, Chartered by the Retail Clerks International Association (Applicant) v. Orillia Steelworkers Building Association (Respondent).

Unit: “all employees of the respondent in Orillia, Ontario save and except managers, those above the rank of manager, and those persons covered by subsisting collective agreements.” (3 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note – see Report of full decision (1979) OLRB Rep. January*).

1687-78-R: Labourers International Union of North America, Local 607 (Applicant) v. Environmental Technical Services Mechanical Ltd. (Respondent).

Unit: “all construction labourers in the employ of the respondent in the District of Thunder Bay, save and except non-working foremen and persons above the rank of non-working foreman.” (9 employees in the unit).

1688-78-R: Service Employees International Union, Local 183, AF of L., C.I.O., C.L.C. (Applicant) v. Trenton Memorial Hospital (Respondent).

Unit: “all employees of the respondent at Trenton regularly employed for not more than twenty-four hours per week, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, technical personnel, supervisors, foremen and persons above the rank of supervisor or foreman, Chief Engineer and office and clerical personnel.” (15 employees in the unit).

1690-78-R: Ontario Nurses’ Association (Applicant) v. Extendicare Ltd. (Medex Nursing Centre) (Respondent).

Unit: “all registered and graduate nurses employed by the respondent in a nursing capacity at the Medex Nursing Centre, Ottawa, save and except Nursing Supervisor, persons above the rank of Nursing supervisor and persons regularly employed for not more than 24 hours per week.” (4 employees in the unit).

1716-78-R: United Brotherhood of Carpenters and Joiners of America, Local 38 (Applicant) v. Lakeport Wood Products Limited (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in the unit).

Applications Certified Subsequent to Pre-Hearing Vote

0114-78-R: Labourers’ International Union of North America, Local 506 (Applicant) v. Vanbots Construction Co. Limited (Respondent) v. The General Contractors’ Section of the Toronto Con-

struction Association (Intervener #1) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener #2).

Unit: "all cement masons and cement masons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

Number of names of persons on revised voters' list		1
Number of persons who cast ballots		1
Number of spoiled ballots	0	
Number of ballots marked in favour of applicant	1	
Number of ballots marked in favour of intervener #2	0	

1540-78-R: United Steelworkers of America (Applicant) v. Domtar Construction Materials (Respondent) v. International Chemical Workers Union and its Local 603 (Intervener).

Unit: "all employees of the respondent at Brantford, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (91 employees in the unit).

Number of names of persons on list as originally prepared by employer		91
Number of persons who cast ballots		79
Ballots segregated and not counted	1	
Number of ballots marked in favour of applicant	78	

Applications Certified Subsequent to Post-Hearing Vote

1147-78-R: International Union of Operating Engineers, Local 793 (Applicant) v. Sandercock Construction (1976) Ltd. (Respondent) v. Christian Labour Association of Canada (Intervener #1) v. Labourers International Union, Local 1089 (Intervener #2).

Unit: "all truck drivers in the employ of the respondent in the County of Lambton and all employees of the respondent in the County of Lambton engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen, persons above the rank of non-working foreman and employees covered by a subsisting collective agreement between the respondent and the Labourers' International Union of North America, Local 1089." (14 employees in the unit).

Number of names of persons on list as originally prepared by employer		14
Number of persons who cast ballots		14
Number of ballots marked in favour of applicant	11	
Number of ballots marked in favour of intervener #1	3	

1232-78-R: Ontario Nurses' Association (Applicant) v. Queensway-Carleton Hospital (Respondent).

Unit #1: "all registered and graduate nurses engaged in a nursing capacity employed by Queensway-Carleton Hospital, Ottawa, save and except assistant co-ordinator, persons above the rank of assistant co-ordinator and persons regularly employed for not more than twenty-four per week." (90 employees in the unit). (*clarity note* – see Report of full decision (1979) OLRB Rep. January).

Number of names of persons on list as originally prepared by employer		95
Number of persons on revised voters' list	92	
Number of persons who cast ballots	70	
Number of ballots marked in favour of applicant	46	
Number of ballots marked against the applicant	24	

(Bargaining Unit #2 – See Bargaining Units Certified – No Vote Conducted).

1453-78-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. M. Loeb Limited (Respondent).

Unit: "all employees of the respondent's Cash and Carries located in Ottawa and Vanier, save and except managers, persons above the rank of manager, office and sales staff and students employed during the school vacation period." (16 employees in the unit).

Number of names of persons on list as originally prepared by employer		15
Number of persons who cast ballots	15	
Number of ballots marked in favour of applicant	12	
Number of ballots marked against the applicant	3	

APPLICATIONS FOR CERTIFICATION DISMISSED

No Vote Conducted

1224-78-R: Retail Clerks Union Local 206 chartered by the Retail Clerks International Union (Applicant) v. Newt Webster Produce Ltd. (Respondent). (22 employees).

1242-78-R: Local 47 Sheet Metal Workers' International Association (Applicant) v. M & AL Roofing Ltd. (Respondent). (3 employees).

1556-78-R: United Brotherhood of Carpenters and Joiners of America, Local Union 38 (Applicant) v. Lakeport Wood Products Limited (Respondent). (2 employees).

1559-78-R: Laundry and Linen Drivers and Industrial Workers Union, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Rixson-Firemark (Canada) Ltd. (Respondent) v. Group of Employees (Objectors). (13 employees).

1576-78-R: Canadian Chemical Workers Union (Applicant) v. Domtar Inc. Domtar Chemicals Group/CDC Division (Respondent) v. International Union of Operating Engineers, Local 772 (Intervener).

Unit: "all employees of the respondent at Hamilton, save and except foremen and supervisors, persons above the rank of foreman and supervisor, office staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and employees covered by existing collective agreements." (6 employees in the unit).

Certification Dismissed Subsequent to Pre-Hearing Vote

1475-78-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (U.A.W.) (Applicant) v. Burnstein Castings Limited (Respondent).

Voting Constituency: "All employees of the Respondent in St. Catharines, Ontario save and except Foremen, persons above the rank of Foreman, office and sales staff and students employed during the school vacation period." (154 employees).

Number of names of persons on list as originally prepared by employer		154
Number of persons who cast ballots		136
Ballots segregated and not counted	136	
Number of spoiled ballots	5	
Number of ballots marked in favour of applicant	50	
Number of ballots marked against applicant	81	

1514-78-R: Canadian Union of Public Employees (Applicant) v. Versa-Care Centres of Ontario Limited (Respondent) v. Christian Labour Association of Canada (Intervener).

Voting Constituency: "All employees of Versa-Care Centres of Ontario Ltd. employed at Versa-Care Centre of Owen Sound, at 850-4th St. East, Owen Sound, Ontario, save and except Registered Nurses, Supervisors, persons above the rank of Supervisor, Activity Director, Office Staff and Students employed during the school vacation period." (79 employees).

Number of names of persons on list as originally prepared by employer		79
Number of persons who cast ballots		50
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	47	
Number of segregated ballots casts by persons whose names do not appear on voters' list	3	
<i>Ballot Box Sealed</i>		

Certification Dismissed Subsequent to Post-Hearing Vote

0553-78-R: Canadian Food and Allied Workers Union Local 633, chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Applicant) v. Ontario Food Division (Food City) of the Oshawa Group Limited (Respondent).

Unit: "all meat department employees of the respondent in its stores in the municipality of St. Catharines, save and except meat manager, persons above the rank of meat manager, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (6 employees in the unit).

Number of names of persons on list as originally prepared by employer		7
Number of persons who cast ballots		7
Number of ballots marked in favour of applicant	0	
Number of ballots marked against applicant	7	

1297-78-R: Hotels, Clubs, Restaurants, Tavern Employees' Union, Local 261 (Applicant) v. A & W Merchandising Ltd. (Respondent).

Unit: "all employees of the respondent at 670 Bronson Avenue, Ottawa, save and except the Manager, Assistant Manager, Supervisors, persons above the rank of supervisor, office staff and persons working less than 24 hours per week." (34 employees in the unit).

Number of names of persons on revised voters' list		15
Number of persons who cast ballots		12
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	1	
Number of ballots marked against applicant	10	

APPLICATIONS FOR CERTIFICATION WITHDRAWN

0509-78-R: United Garment Workers of America (Applicant) v. Avon Sportswear (Respondent). (309 employees).

1555-78-R: United Brotherhood of Carpenters and Joiners of America, Local Union 38 (Applicant) v. Linwell Wood Products (Respondent). (2 employees).

1665-78-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local 91, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. M. Loeb Limited (Respondent). (6 employees).

1725-78-R; United Brotherhood of Carpenters and Joiners of America (Applicant) v. Titan Wood Products Limited Hida Industries Limited (Respondents). (90 employees).

1735-78-R: Retail Clerks Union, Local 206, Chartered by Retail Clerks International Union (Applicant) v. Fine Papers of London Ltd. (Respondent). (8 employees).

APPLICATION UNDER SECTION 1(4)

0543-78-R: Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 141 (Applicant) v. Kingsville Cartage Company Limited and Coghill Enterprises Inc. (Respondents). (2 employees).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0194-78-R: Claude Leduc (Applicant) v. Local Union 1687 of the International Brotherhood of Electrical Workers (Respondent) v. M. G. Burke Investments Ltd. (Intervener). (3 employees). (*Dismissed*).

0980-78-R: Laura McQuattie et al (Applicant) v. United Steelworkers of America (Respondent) v. Arnold-Nasco Limited (Intervener). (21 employees). (*Dismissed*).

1318-78-R: Bernard Martin (Applicant) v. The Graphic Arts International Union Local 12L Toronto (Respondent) v. Brian E. Baker of Nor Baker Industries Ltd. (Intervener). (*Granted*).

Unit: "all employees of Nor Baker Industries Ltd." (14 employees in the unit).

Number of names of persons on list as originally prepared by employer		14
Number of persons who cast ballots		14
Number of ballots marked in favour of Respondent	0	
Number of ballots marked against Respondent	14	

1323-78-R: Adrienne Ponsen (Applicant) v. United Steelworkers of America, Locals 3129 and 7921 (Respondent) v. Canadian Appliance Manufacturing Company Limited (Intervener). (105 employees). (*Dismissed*).

1339-78-R: Francis Ernewein, on behalf of a group of employees (Applicant) v. Local 173, Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Respondent) v. Kitchener Beverages Limited (Intervener). (43 employees). (*Dismissed*).

1427-78-R: Lonnie Langmuir, Craig Colvin, Jim Sutherland et al (Applicants) v. United Steelworkers of America (Respondent) v. St. Marys Cement Company (Intervener). (*Granted*).

Unit: "all employees of the St. Marys Cement Company in the Township of Darlington, save and except foremen, persons above the rank of foreman, office and sales staff." (91 employees in the unit).

Number of names of persons on revised voters' list		90
Number of persons who cast ballots		89
Number of spoiled ballots	1	
Number of ballots marked in favour of respondent	16	
Number of ballots marked against the respondent	72	

1456-78-R: Bargaining Unit Employees of Neo Industries Limited (Applicant) v. Local 1267 of the Oil and Gas Technicians, Service, Domestic and General Workers L.I.U. of N.A. (Respondent) v. Neo Industries Limited (Intervener). (16 employees). (*Granted*).

1543-78-R: Alessandro Cusinato, Thomas Kraus, Kenneth Milne, Andrew Cook and John McConnell (Applicants) v. The Canadian Brotherhood of Railway, Transport & General Workers (Respondent). (5 employees). (*Dismissed*).

1594-78-R: Employees of Cavalier Beverages Ltd. (Applicant) v. Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Respondent) v. Finlock Beverages Ltd. (Intervener). (14 employees). (*Dismissed*).

1635-78-R: Ellen Hay (Applicant) v. The Canadian Union of Public Employees Local 2190 (Respondent). (180 employees).

APPLICATION FOR DECLARATION OF SUCCESSOR STATUS

1324-78-R: United Cement, Lime and Gypsum Workers International Union (Applicant) v. Nelson Crushed Stone, A Division of King Paving and Materials, A Division of The Flintkote Company of Canada Limited (Respondent). (*Granted*).

APPLICATIONS FOR DECLARATION THAT STRIKE UNLAWFUL

1659-78-U: Windsor Raceway Holdings Limited (Applicant) v. Windsor Raceway Union, Local 639, Service Employees International Union, Walter Adamus, Lyman Allen et al (See Schedule "A." Attached) (Respondents). (*Withdrawn*).

1660-78U: Windsor Raceway Holdings Limited (Applicant) v. Windsor Raceway Union, Local 639, Service Employees International Union, Walter Adamus, Lyman Allen et al (see Schedule "A" attached) (Respondents). (*Direction*).

1711-78-U: Emco Limited (Applicant) v. The United Steelworkers of America, Local 2699, Tim Whitty, Greg Swan, Paul Gravelle and other respondents listed on Schedule "A" attached hereto (Respondents). (*Granted*).

1722-78-U: The Canadian Salt Company Limited (Applicant) v. The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.) Local 240, Donald Bratt, Lawrence Burgess (Respondents). (*Withdrawn*).

1723-78-U: The Canadian Salt Company Limited (Applicant) v. The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.), Local 195, Joseph Robin Beaune, et al (Respondents). (*Withdrawn*).

1724-78-U: The Canadian Rock Salt Company Limited (Applicant) v. The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.), Local 195, Emmanuel Aliu, et al (Respondents). (*Withdrawn*).

APPLICATION FOR DECLARATION THAT LOCK-OUT UNLAWFUL

1470-78-U: Ontario Taxi Association (Applicant) v. Glen Taxi, Dennis Devine, Leslie Markham (Respondent). (*Withdrawn*).

APPLICATIONS FOR CONSENT TO PROSECUTE

1053-78-U: Canadian Food and Allied Workers Union Local 633, chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Applicant) v. Ontario Food Division (Food City) of the Oshawa Group Limited and Robert Parker and David Jenkins and Gerald Pilon (Respondents). (*Terminated*).

1471-78-U: Ontario Taxi Association (Applicant) v. Glen Taxi, Dennis Devine, Leslie Markham (Respondent). (*Withdrawn*).

1531-78-U: Pharmacists and Professional Employees Association, Local 1976, Chartered by the Retail Clerks International Union, C.L.C., A.F.L.-C.I.O. (Applicant) v. Kentwood Nursing Home Ltd. and Kent Fallis, Administrator (Respondent). (*Withdrawn*).

1534-78-U: Fuel, Bus, Limousine, Petroleum Drivers and Allied Employees Local Union No. 352 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Milnes Fuel Oil Limited and Al Hagalund (Respondent). (*Withdrawn*).

1549-78-U: Retail Clerks Union, Local 206, chartered by the Retail Clerks International Union (Applicant) v. Newt Webster Produce Ltd. (Respondent). (*Withdrawn*).

1661-78-U: Windsor Raceway Holdings Limited (Applicant) v. Windsor Raceway Union, Local 639, Service Employees International Union, Walter Adamus, Lyman Allen et al (See Schedule "A" Attached) (Respondent). (*Withdrawn*).

COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

1724-77-U: William McClue (Complainant) v. The City of Hamilton and The Canadian Union of Public Employees, Local 167 (Respondents). (*Dismissed*).

1874-77-U: United Brotherhood of Carpenters and Joiners of America (Complainant) v. Canac Kitchens Limited (Respondent). (*Dismissed*).

0388-78-U: Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO-CLC (Complainant) v. Levine Bros. Hides (Ontario) Limited (Respondent). (*Withdrawn*).

0685-78-U: United Garment Workers of America (Complainant) v. Avon Sportswear (Respondent). (*Withdrawn*).

0742-78-U: The United Brotherhood of Carpenters and Joiners of America (Complainant) v. M. Sullivan and Son Limited (Respondent).

- and -

0854-78-U: The United Brotherhood of Carpenters and Joiners of America (Complainant) v. M. Sullivan and Son Limited (Respondent). (*Terminated*).

0931-78-U: Olavi Hukari and Raymond Parr (Complainant) v. Christian Labour Association of Canada and John Adema (Respondent). (*Dismissed*).

1054-78-U: Canadian Food and Allied Workers Union Local 633, chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Complainant) v. Ontario Food Division (Food City) of the Oshawa Group Limited and Robert Parker and David Jenkins and Gerald Pilon (Respondents). (*Granted*).

1325-78-U: Association of Employees for the Mentally Handicapped at Countryside (Complainant) v. North Halton Association for the Mentally Retarded (Respondent). (*Dismissed*).

1363-78-U: Oilburner Servicemen's Association (Complainant) v. Shell Canada Limited (Respondent). (*Withdrawn*).

1433-78-U: Ontario Taxi Association (Complainant) v. Glen Taxi Ltd. (Respondent). (*Withdrawn*).

1465-78-U: Amalgamated Meat Cutters and Butcher Workmen of North America (Complainant) v. Cuddy Food Products Limited (London, Ontario) (Respondent). (*Granted*).

1469-78-U: Ontario Taxi Association (Complainant) v. Glen Taxi (Respondent). (*Withdrawn*).

1478-78-U: Ontario Nurses' Association (Complainant) v. Scarborough Centenary Hospital Association (Respondent). (*Granted*).

1504-78-U: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.) (Complainant) v. Young Warren Food Brokerage Limited Big Bear Storage, Walter Ehret and John Young (Respondents). (*Withdrawn*).

1517-78-U: Canadian Food and Allied Workers Local Union 633 (Complainant) v. Nortown Meats & Specialties Limited (Respondent). (*Withdrawn*).

1547-78-U: Amalgamated Meat Cutters and Butcher Workmen of North America (Complainant) v. Cuddy Food Products Limited (London, Ontario) (Respondent). (*Granted*).

1566-78-U: Indalloy, Division of Indal Limited (Complainant) v. United Steelworkers of America, Local 2729 and Mr. Fortunato Rao (Respondents). (*Dismissed*).

1581-78-U: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Complainant) v. Rest Haven Nursing Home of St. Williams 1974 Ltd. (Respondent). (*Withdrawn*).

1584-78-U: International Molders' and Allied Workers' Union, Local 30 (Complainant) v. Canon Limited – Pipe Division (Respondent). (*Dismissed*).

1597-78-U: Hugh R. Castle (Complainant) v. Watson E. Cook, President Amalgamated Plant Guards, Local 1962 United Plant Guard Workers of America (Respondent). (*Withdrawn*).

1630-78-U: Miss Donna Letang (Complainant) v. Service Employees' Union, Local 210; and Mr. Jeffries, Union Representative; and Mrs. S. Lindsay, Shop Steward (Respondents). (*Withdrawn*).

1632-78-U: Canadian Chemical Workers Union (Complainant) v. Prescott Machine and Welding Inc. (Respondent). (*Withdrawn*).

1638-78-U: International Beverage Dispensers' and Bartenders' Union Local 280 of the Hotel and Restaurant Employees and Bartenders' International Union A.F.L.-C.I.O.-C.L.C. (Complainant) v. Queensbury Inn Enterprises Inc. (Respondent). (*Withdrawn*).

1642-78-U: Labourers' International Union of North America, Local 183 (Complainant) v. Finch Jane Highrise Holdings Limited and Mr. Amar Kaushal and Dr. S. Koli and Mr. P. Bugg (Respondents). (*Withdrawn*).

1648-78-U: Ralph Malcolm Derry (Complainant) v. Booth Avenue Hospital Laundry Inc., and The Textile Rental Institute of Ontario (Respondent) v. Laundry, Dry Cleaning & Dye Workers International Union, Local 351 (Intervener). (*Dismissed*).

1662-78-U: Phillip Karl Johnson (Complainant) v. Graphic Arts International Union Local 12L (Respondent). (*Withdrawn*).

1663-78-U: United Steelworkers of America (Complainant) v. Canadian Ingersoll-Rand Co. Limited (Respondent). (*Withdrawn*).

1689-78-U: United Brotherhood of Carpenters and Joiners of America (Complainant) v. Canac Kitchens Ltd. (Respondent). (*Withdrawn*).

1698-78-U: Andy Drysdale (Complainant) v. Sign and Pictorial Local 1630. District Council 46 (Respondent). (*Withdrawn*).

APPLICATIONS UNDER SECTION 55 •

1065-78-R: United Brotherhood of Carpenters and Joiners of America, Local 3054 (Applicant) v. The Toronto-Dominion Bank and Price-Waterhouse Limited (Respondents). (*Dismissed*).

1599-78-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.) and its Local 1090 (Applicant) v. Plastics Surface Finishers Limited and Plastics Plating Company Limited (Respondents). (*Withdrawn*).

APPLICATIONS FOR DETERMINATION UNDER SECTION 95(2)

0998-78-M: The Association of Allied Health Professionals: Ontario (Applicant) v. Ottawa Crippled Children's Treatment Centre (Respondent). (*Dismissed*).

1241-78-M: Canadian Chemical Workers Union (Applicant) v. Northern and Central Gas Corporation Limited (Respondent). (*Withdrawn*).

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1378-78-M: Sudbury Nursing Home Limited (Employer) v. Ontario Nurses' Association (Trade Union). (*Terminated*).

1586-78-M: UOP Manufacturing Limited (Employer) v. International Woodworkers of America (Trade Union). (*Terminated*).

1593-78-M: Delaware Nursing Home (Employer) v. Ontario Nurses' Association (Trade Union). (*Terminated*).

APPLICATIONS UNDER SECTION 112A

1430-77-M: Labourers' International Union of North America, Local 183 (Applicant) v. Relac Construction Ltd. (Respondent). (*Withdrawn*).

0162-78-M: Labourers' International Union of North America, Local 183 (Applicant) v. Relac Construction Ltd. (Respondent). (*Withdrawn*).

1546-78-M: A Council of Trade Unions, acting as the representative and agent of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union 230 and Labourers' International Union of North America, Local 183; International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union 230 and Labourers' International Union of North America, Local 183 (Applicants) v. The Metropolitan Toronto Road Builders' Association and Prospect Paving Limited (Respondents). (*Withdrawn*).

1552-78-M: Labourers' International Union of North America, Local 527 (Applicant) v. Marvo Construction Ltd. (Respondent). (*Withdrawn*).

1562-78-M: United Brotherhood of Carpenters and Joiners of America, Local Union No. 249 (Applicant) v. Hugh Murray (1974) Limited (Respondent). (*Granted*).

1570-78-M: Labourers' International Union of North America, Local 527 (Applicant) v. B. J. Normand Ltd. (Respondent). (*Withdrawn*).

1578-78-M: Chatham Construction Workers Association Local No. 53, affiliated with the Christian Labour Association of Canada (Applicant) v. Poirier Engineering Limited (Respondent). (*Withdrawn*).

1585-78-M: International Union of Bricklayers and Allied Craftsmen, The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and The International Union of Bricklayers and Allied Craftsmen, Local 4 (Applicants) v. The Masonry Industry Employers' Council of Ontario and Star Masonry Contractor (Respondents). (*Withdrawn*).

1588-78-M: International Union of Operating Engineers, Local 793 (Applicant) v. Foster Wheeler Ltd. (Respondent). (*Granted*).

1614-78-M: Labourers' International Union of North America, Local 493 (Applicant) v. Tamar Construction Limited (Respondent). (*Granted*).

1658-78-M: International Union of Operating Engineers, Local 793 (Applicant) v. Employer Bargaining Agency and G & R Excavating (Respondents). (*Withdrawn*).

1692-78-M: International Union of Operating Engineers Local 793 (Applicant) v. Mizzi Brothers Construction Ltd. (Respondent). (*Granted*).

1728-78-M: Labourers' International Union of North America, Local 183 (Applicant) v. Metropoli-

tan Toronto Apartment Builders Association – and – George Wimpey Canada Limited (Respondents). (*Withdrawn*).

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1548-78-U: Amalgamated Meat Cutters and Butcher Workmen of North America (Complainant) v. Cuddy Food Products Limited (London Ontario) (Respondent). (*Prosecution*). (*Request Denied*).

1803-77-U: Walter Clement Sarich (Complainant) v. The Corporation of the City of Sault Ste. Marie (Respondent). (*Section 79*). (*Request Denied*).

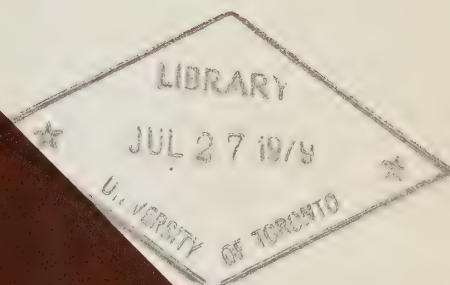
1939-77-M: Canadian Union of Public Employees, Local 1582 (Trade Union) v. Metropolitan Toronto Library Board (Employer). (*Section 95(2)*). (*Request Denied*).



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**A Monthly Series of Decisions from the
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1431-78-R; 1432-78-R International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.), (Applicant), v. Coopers & Lybrand Limited Young-Warren Food Brokerage Limited 394579 Ontario Ltd. carrying on business under the style **Big Bear Storage**, (Respondents), v. Group of Employees, (Objectors).

Sale of a Business – Alleged successor acquiring essential elements of the business through series of transactions including through a receiver – Board finding sale of business not merely assets subsequently used in parallel business.

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members O. Hodges and W.F. Murray.

APPEARANCES: *H.P. Rolph, Sam Dick and F. Kenney for the applicant; James O'Connor for the respondent Coopers & Lybrand Limited; Janice Baker, Walter Ehret, John Young and Bernard Kelly, Q.C. for the respondents Young-Warren Food Brokerage Limited and Big Bear Storage.*

DECISION OF THE BOARD; March 9, 1979

1. The name "Big Bear Storage" appearing in the style of cause of these applications as the name of one of the respondents is amended to read: "394579 Ontario Ltd. carrying on business under the style Big Bear Storage."
2. The Board hereby directs that the above applications be and the same are hereby consolidated.
3. The applicant claims that there has been a sale of a business by Oakville Storage and Forwarders Limited and Warehouse Deliveries Limited to Coopers & Lybrand Limited, Young-Warren Food Brokerage Limited and Big Bear Storage within the meaning of section 55 of the Act and further, that Young-Warren Food Brokerage Limited and Big Bear Storage are one employer for purposes of the Act. The applicant withdrew both the Section 1(4) application and the Section 55 application in respect of Coopers and Lybrand and advised the Board that it acknowledged that the disposal of the assets of Warehouse Deliveries Limited did not constitute a sale of a business within the meaning of Section 55 of the Act. The issue before the Board, therefore, is whether there has been a sale of a business within the meaning of section 55 of the Act between Oakville Storage and Forwarders Ltd. (the predecessor employer) and Big Bear Storage Ltd. (the alleged successor).
4. The facts giving rise to this application are clear on the evidence and may be summarized as follows. The predecessor employer, who was party to a collective agreement with the applicant union, ran two businesses from rented premises at 1290 Blendale Road. Oakville Storage and Forwarders Ltd. was a warehousing business specializing in food products and Warehouse Deliveries Limited was essentially a cartage or delivery service. On Wednesday, September 13, 1978 Coopers and Lybrand Limited was appointed by the Royal Bank of Canada as receiver and manager of both Oakville Storage and Forwarders Ltd. and Warehouse Deliveries Limited. Mr. F. Florence, a manager with Coopers and Lybrand, testified that the receiver decided to stop operating warehouse deliveries and attempt to find a

purchaser for the assets of both Warehouse Deliveries and Oakville Storage. It was further decided to continue to operate Oakville Storage and the evidence establishes that the manager of the warehouse under the predecessor owner, Mr. W. Ehret, was retained to work in the warehouse along with two of the seven bargaining unit employees and that the warehouse business continued to operate, albeit on a reduced scale, during the period September 12 to September 21, 1978. During this period goods were shipped to customers who requested shipment and a small quantity of goods entered the warehouse.

5. The receivers contacted Mr. John Young, president and owner of Young-Warren Food Brokerage Ltd., immediately upon being appointed. Mr. Young had a small quantity of goods stored in the warehouse and, as president of Young-Warren Food Brokerage Ltd., had a relationship with many of the customers of Oakville Storage. Mr. Florence testified that Mr. Young "was shown the premises with a view to possibly carrying on with existing customers." Mr. Florence gave further uncontradicted testimony that Mr. Young made enquiries about the lease when looking at the assets and was advised that the receiver could not convey the lease and that he would have to make his own arrangements with the owner of the premises.

6. The evidence establishes that on Friday, September 15, 1978 Mr. Young made an offer to purchase certain assets of Oakville Storage; these being the tow motors, storage racks and the office equipment and furniture. The offer did not include accounts receivable, inventory or goodwill. Mr. Florence testified that the business was insolvent and consequently there was no goodwill to purchase. The evidence further establishes that *prior* to making this offer Mr. Young had made arrangements with the owner of the premises at 1290 Blendale Road that should his offer be accepted he would be offered a lease effective from October 1, 1978 which would be essentially the same as the lease extended to Oakville Storage and Forwarders. Oakville's lease was paid-up until the end of September. Further, he had made arrangements with Mr. Ehret, the manager of the warehouse under the predecessor owner, that should his offer be accepted Mr. Ehret would stay on as manager and finally, he had spoken to a number of the customers of Oakville, including the largest customer – Starkist, prior to making his offer and had received assurances from them that they would continue to store their goods at the 1290 Blendale Road premises should he run a warehouse business from those premises. Mr. Young, in his capacity as president of Young-Warren Food Brokers had a relationship with a number of customers of Oakville Storage and Forwarders and the Board is satisfied that the decision of these customers to continue to store goods at these premises was in part at least based on this relationship. Mr. Young testified "if Starkist had decided to move we would not have bought the business."

7. Mr. Young's offer to purchase the assets listed above was accepted by the receiver and the keys to the premises were turned over to Mr. Ehret, representing Mr. Young, on Thursday, September 21, 1978. The former employees of Oakville, including the two who had worked continuously throughout the period of the receivership, were "rehired" to work in the warehouse. The bargaining unit employees of the new company, now called "Big Bear Storage", were immediately assigned to unload 30 freight cars which had been left on the siding outside the premises during the 8 day period of the receivership. Big Bear occupied the premises effective from October 1, 1978 under the terms of a lease essentially the same as that enjoyed by the predecessor. On or about October 1, 1978 Big Bear Storage (now Big Bear Storage Ltd.) sent the following notice to its customers under the signature of Mr. Ehret, the former manager of Oakville Storage and now the General Manager of Big Bear.

"Please be advised that Oakville Storage will in future operate under the name of BIG BEAR STORAGE.

Please advise all necessary departments to change records reflecting the name change to the following:

BIG BEAR STORAGE
1290 Blundell Road
Mississauga, Ontario
L4Y 1M5

Tel: (416) 276-6650

Remittances to be made out to Big Bear Storage."

8. Section 55 of the Act provides that where a business or part of a business is sold, leased, transferred or otherwise disposed of, the successor employer is bound by the collective bargaining obligations of its predecessor. Section 55(2), which is relevant to this case, states:

"Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application."

9. In the recent *Thunder Bay Ambulance Service* case [1978] OLRB Rep. May 467, the Board discussed the scope of the section and its purpose in the following terms at paragraphs 11, 12 and 13.

"11. The word 'sells' as used in Section 55 of the Act has been given an expansive statutory definition so as to 'include leases, transfers and any other manner of disposition.' In the leading *Thorco Manufacturing Co.* case, 65 CLLC 787 the Board discussed the components of the statutory definition in the following terms:

'The word *transfers* is obviously a term of wide signification and unless restricted by the context is capable of describing a multitude of transactions whether by sale, exchange, gift, trust or otherwise by which property, rights, interests etc. are transmitted absolutely, conditionally etc. or by operation of law from one person to another.'

and went on to state:

'... it is more in harmony with the language of and the remedy envi-

saged by the enactment to interpret the words *and any other manner of disposition* as an omnibus or saving provision intended to include disposition of the business ... by any mode or means whatever not appropriately described by ... *leases or transfers.*'

The section does not require that there be a direct transfer between predecessor and successor and the Board has unequivocally stated that 'it makes no difference whether the business has been transferred directly from the employer named in the collective agreement (or for which the union holds bargaining rights) or whether it has been transferred through a receiver or some other intermediary.' (See *Winiker Industrial Auctioneers Ltd.* Board File No. 1257-77-R dated January 20, 1978). Indeed, in a number of cases the Board has found a sale of a business where the disposition of the predecessor's business has been made by a receiver. (See *Marvel Jewellery Limited* [1975] OLRB Rep. Sept. 733, *D.H.I. Limited* [1974] OLRB Rep. Aug. 237, *Culverhouse Foods Limited*, [1976] OLRB Rep. Nov. 691). The word 'sells' as used in Section 55 of the Act encompasses any transaction or series of transactions which results in the transfer of the predecessor's 'business' or parts thereof.

12. The expansive meaning which attaches to the term 'sells' as used in Section 55 underscores the purpose of the section. The section is designed to preserve bargaining rights regardless of the legal form of the transaction, where there is a continuum of the business. The Board discussed the intent of the section in *Aircraft Metal Specialists Limited*, [1970] OLRB Rep. Sept. 702 in the following terms:

'Once the union has been recognized with respect to a particular business the union then obtains a right to bargain with respect to wages, hours and other conditions of employment in that business. The right to participate in the business and its functions in that manner is in the nature of a vested right and Section 47A (now Section 55) allows the union to pursue that bargaining right when all or part of the business is sold.'

Bargaining rights which are conferred by the Board or by voluntary recognition attach to a particular business and continue by operation of Section 55 so long as the business continues.

13. Although the section is designed to apply to all manner of transactions it is clear that whatever the form of the transaction it must result in a continuation of the business to which the union's bargaining rights attach. The fundamental task which confronts the Board in these cases, therefore, is to determine the nature of the alleged predecessor's business and whether or not that business has been transferred. In this regard the Board must distinguish between the predecessor's business and its components (i.e. fixed assets, goodwill, inventory, accounts receivable, customer lists, leases etc.). Clearly, one or more of the component elements of a business can be transferred without there being a 'sale of a business.' (See re *Dufferin Steel Awico*

Division case, [1976] OLRB Rep. March 81 and the cases referred to therein.) The Board has stated that 'the most important factor considered ... is the nature of the work performed' and indeed, in most cases where there has been a transfer of one or more of the component elements of the business and the work continues unchanged the Board will find that there has been a sale of a business within the meaning of Section 55 of the Act. (See *Culverhouse Foods Limited* case (supra).) The Board, however, must be careful to distinguish between the predecessor's 'business' and a similar or parallel business which performs work of a similar nature. In the former the transfer is a sale of a business within the meaning of Section 55 whereas in the latter situation it is not. The *Sunnybrook Food Market* case (supra) cited by counsel for the respondent company, involved the sale of certain assets and the start up of a similar business at the same location as the predecessor. Notwithstanding the sale of certain assets and the similarity of work, the Board found that the predecessor's 'business' had not been transferred. (See also *Zehrs Markets Ltd* [1974] OLRB Rep. June 331, *Ralph Ford Electrical Contractors Ltd.* [1974] OLRB Rep. June 388 and *C.C. & Point Anne Quarry Co.* [1975] OLRB Rep. Dec. 905.). The union's bargaining rights attach to the predecessor's business and their preservation is contingent upon a continuation of that 'business'."

10. In this case the respondent purchased certain assets of the successor (tow motors, racks, office equipment) necessary to the operation of a warehouse business and in a separate transaction acquired leased access to the same premises as the predecessor under almost identical terms and conditions. The significance of the second transaction cannot be overstated in the context of the warehousing industry where goods stored on the premises by the predecessor's customers remain there as of the date the successor occupies these premises. The lease arrangements were made prior to and conditional upon acquisition of the assets referred to above. The evidence also establishes that prior to making its offer to purchase the assets listed above, the respondent made overtures to and was assured by Mr. Ehret, the manager of the warehouse under the successor, that he would manage the respondent's business. In summary, the respondent acquired from the successor (through the receiver) certain assets necessary to the operation of a warehouse business and in a separate transaction acquired leased access to the same premises as those occupied by the predecessor which contained goods stored by the customers of the predecessor. In addition the respondent made arrangements to acquire the predecessor's managerial skills in the person of Mr. Ehret. All of this was done within an 8 day period during which the successor's business continued to operate (albeit on a reduced scale) under the receiver. There was no hiatus of operation. As of September 21, 1978 the respondent commenced to operate its warehouse business from the leased premises referred to above and the employees commenced to perform the same job functions for the respondent as had been performed by the employees of the predecessor. Indeed, 30 rail cars which had arrived at the premises during the period of receivership were unloaded by the respondent upon commencing to operate and the goods stored in the warehouse.

11. Counsel for the respondent argued that because the lease was acquired in an independent transaction without assistance from the predecessor, because there was no transfer of goodwill or name or acquisition of accounts receivable, or acceptance of liability for back wages and because, in her submission, Mr. Young retained the largest customer of the

predecessor through his own efforts and without assistance from the predecessor and thereby brought a critical element to the business himself, the Board should find that there has not been a sale of a business within the meaning of the Act.

12. Unless the predecessor's customers are tied to contracts which can be assigned, it falls to the successor to cultivate and maintain these customers. An attempt by a purchaser to gain access to i. e. through customer lists or cultivate the predecessor's customers is an indicia of the successor's intent to operate the predecessor's business. Conversely, if the alleged successor fails to cultivate or serve the predecessor's customers as in *re Dufferin Steel* (supra), the Board may view this failure as supportive of the conclusion that there has not been a continuation of the predecessor's business. The decision by Mr. Young to gain assurances from the largest customer of the predecessor that it would leave its stored goods at 1290 Bendale Road if he operated a warehouse business from the premises and the decision of Starkist and many of the other customers of the predecessor to do business with Big Bear supports the conclusion that there has been a continuation of the predecessor's business. The fact that he gained these assurances on his own initiative and possibly as a result of his personal reputation in no way supports the conclusion that there has not been a sale of a business. Similarly, the acquisition of the lease by a separate transaction with a third party, as in *re Gordon Markets* [1978] OLRB Rep. July 630, further supports the conclusion that there has been a continuation of the predecessor's business.

13. Having regard to all of the foregoing, the Board is satisfied that there has been the sale of a business to Big Bear Storage within the meaning of Section 55 of the Act. This finding is underscored by the written announcement made by Big Bear Storage to the customers of the predecessor Oakville Storage at the time of the transactions giving rise to this application that "Oakville Storage will in future operate under the name Big Bear Storage."

14. The respondent, Big Bear Storage Limited, is the successor employer within the meaning of Section 55 of the Act and as such continues to be bound by the collective agreement between the applicant union and the predecessor.

1099-76-R International Federation of Professional and Technical Engineers, A.F. of L., C.I.O., C.L.C., Applicant, v. **Canadian General Electric Company Limited**, Respondent, International Union of Electrical Workers, and its Local 599, Intervener.

Bargaining Unit – Certification – Board determining large tag end unit in order to avoid further fragmentation of the bargaining structure.

BEFORE: Pamela C. Picher, Vice-Chairman and Board Members J. D. Bell and O. Hodges.

APPEARANCES: *H. Goldblatt and A. Olling for the applicant; L. Bertuzzi, J. Reynolds and B. Martin for the respondent and Stephen M. Grant and J. Loucks for the intervener.*

DECISION OF THE BOARD; March 23, 1979

1. This is an application for certification.
2. The applicant has applied to be certified as the exclusive bargaining agent for all cost estimators and cost analysts employed by the respondent at Peterborough, Ontario, save and except those of announced supervisory positions, persons above the rank of announced supervisory positions, students employed during the school vacation periods, students employed on a co-operative training programme and persons covered by subsisting collective agreements.
3. The respondent declined to take any position on the appropriateness of the proposed bargaining unit leaving it to the Board to decide the matter pursuant to section 6(1) of the Act. The respondent indicated, however, that its silence did not reflect agreement with the proposed unit.
4. The intervener disputed the appropriateness of the unit proposed on the grounds that the employees the applicant seeks to represent share a closer community of interest with the employees in a bargaining unit already represented by the intervener than with the employees in another bargaining unit represented by a local of the applicant. The intervener further expressed concern for the fragmentation of the bargaining structure that might occur if the Board were to certify the applicant for a unit consisting solely of cost estimators and cost analysts. The intervener declined, however, to suggest to the Board what it considered to be an appropriate bargaining unit.
5. With respect to the intervener's position that it is a more appropriate union than the applicant to represent the cost estimators and cost analysts, we note that with the exception of applications for craft status under section 6(2) of the Act or concerns for an applicant's constitutional ability to represent certain employees, the Board does not normally inquire into the appropriateness of a union to represent employees but only the appropriateness of a proposed bargaining unit (see *Canada Iron Foundries Limited*, 56 CLLC, ¶18,027; *The Hydro Electric Power Commission of Ontario*, [1973] OLRB Rep. Sept. 490 and *Stratford General Hospital*, [1976] OLRB Rep. Sept. 459). Accordingly, the degree of community of interest that the cost estimators and cost analysts may or may not share with employees who are already organized does not affect the matter before the Board.
6. The Board's primary concern in evaluating the appropriateness of a suggested bargaining unit is that the unit represent a viable collective bargaining entity. In assessing the suitability of a proposed unit, the Board is generally guided by two counter-balancing concerns. Firstly, having regard to the proposed unit itself, the Board looks to whether the employees involved share a sufficient community of interest to constitute a cohesive group which will be able to bargain effectively together. Secondly, looking to the employer's operation as a whole, the Board assesses whether the proposed unit is sufficiently broad to avoid excessive fragmentation of the collective bargaining framework. A proliferation of bargaining units is not normally conducive to collective bargaining stability. Not only may it place significant strains on an employer who would be required to bargain with each group, but also it may hamper the employees' ability to bargain effectively with the employer. Under the umbrella of these two guiding principles, the Board seeks to give effect to an equally important concern: the freedom of association guaranteed to employees in section 3 of the Act. As with all freedoms, the principle of freedom of association is not unbridled and must be blended with the Board's responsibility to establish an effective collective bargaining

structure. The Board seeks to balance its respect for an employee's right to associate freely on the one hand with its responsibility to establish a durable collective bargaining entity on the other by requiring that a proposed bargaining unit be the unit appropriate for collective bargaining but not going so far as to insist that it be the most appropriate unit (see *Parnell Foods Limited*, [1969] OLRB Rep. April 38; *The Board of Education for the City of Toronto*, [1970] OLRB Rep. July 430; *Wellesley Hospital*, [1974] OLRB Rep. Jan. 55 and *Livingston Transportation Limited*, [1975] OLRB Rep. July 568).

7. Is the bargaining unit of cost estimators and cost analysts proposed by the applicant appropriate? Does it encompass employees who share a community of interest and at the same time avoid undue fragmentation? Clearly the various cost estimators and cost analysts share a community of interest. The cohesiveness of this group, however, does not necessarily mean that a bargaining unit comprised only of cost estimators and cost analysts is appropriate for collective bargaining.

8. As a general principle bargaining units limited to a particular department or a particular classification are not considered appropriate by the Board (see *The Corporation of The City of Barrie*, [1974] OLRB Rep. Nov. 813). There are innumerable cases where because of its aversion to fragmentation the Board has refused to recognize as appropriate a unit containing only a small segment of employees within an employer's overall operation. In the *Board of Health of the York-Oshawa District Health Unit*, [1969] OLRB Rep. June 340, for example, the Board stated that it would not fragment the respondent's technical employees because "to do so would create a collective bargaining situation where the respondent would be required to deal separately with clerical employees, public health inspectors, registered nursing assistants and dental hygienists." (p. 341). In *Waterloo County Health Unit*, [1969] OLRB Rep. Jan. 1016 the Board refused to certify the applicant for a unit composed of public health inspectors when there were other persons including dental hygienists in the health unit. Similarly, in *McMaster University*, [1973] OLRB Rep. Feb. 102, the Board refused to allow the applicant to carve out from the University all non-professional library employees and indicated that the appropriate unit would be all clerical, technical and office employees of the university. As well, in *The Regional Municipality of York*, [1971] OLRB Rep. June 316 the Board denied the applicant's proposed bargaining unit of employees in the survey section of the engineering department when there were six additional branches of the engineering department (see also *The Corporation of the Township of Markham*, [1969] OLRB Rep. Aug. 592 and *The Board of Education for the Borough of North York*, [1970] OLRB Rep. Dec. 915). In cases where the Board has certified a segregated group of employees, it has generally been satisfied that the segment in question constituted a recognizable, cohesive group functioning as an independent entity. (see *Ex-Cell-O Corporation of Canada, Limited*, [1974] OLRB Rep. Aug. 543; *The Governors of the University of Toronto*, [1969] OLRB Rep. Feb. 1149, and *University of Western Ontario*, [1972] OLRB Rep. Dec. 1038).

9. The exercise of highly specialized skills by employees in a proposed bargaining unit, moreover, does not by itself establish that those employees form an appropriate bargaining unit. In *Stratford General Hospital*, [1976] OLRB Rep. Sept. 459, for example, the Board refused to recognize as appropriate a unit encompassing paramedicals employed in a professional capacity and declared instead that the unit appropriate for collective bargaining was one that would include paramedicals employed in both a technical and professional capacity thereby bringing together in one unit occupations such as psychologists, social workers, pharmacists, physiotherapists, radiological technicians and respiratory technolo-

gists. The Board was of the view that these two groups did not function independently of one another in that all the occupations in question were integrally related to the medical treatment process. The Board concluded that the group shared a functional interdependence because the paramedicals employed in a professional capacity regularly relied on information and analysis provided by the other paramedical occupations. To break the group along a technical/professional line would have, in the Board's view, caused undue fragmentation in the hospital.

10. Having regard to the Board's jurisprudence and the principles it looks to in determining the appropriateness of proposed bargaining units, the Board is persuaded in this case that a bargaining unit restricted to cost estimators and cost analysts is inappropriate. The evidence establishes that the cost estimators and cost analysts do not function as an independent group but are in frequent professional contact with and rely on information from persons employed in other departments of the respondent's operation. (For a full discussion of their duties and responsibilities see the Board's decision in this matter dated January 31, 1979). Furthermore, to find that the unit proposed in this application is the unit appropriate for collective bargaining would open the door to a fragmentation of the bargaining structure by allowing the category of "Management and Professional, Individual Contributors" (of which the cost estimators and cost analysts are but one segment) to be carved up into numerous bargaining units in the event that persons in other included categories become organized and are employees within the meaning of the Act. The buyers and value analysts, for example, two additional groups within the "Management and Professional, Individual Contributors" classification are the subject of another application for certification which is pending before this Board.

11. In the process of organizing an employer's operation there may come a point when having regard to the extent of organization which has already taken place, the Board may decide that in order to avoid excessive fragmentation of the remnant group the appropriate unit is a tag-end unit encompassing the remaining unorganized employees with the possible exception of any remaining unorganized group(s) that the Board has traditionally recognized as constituting an appropriate unit. By the time an operation reaches a tag-end situation concerns for further fragmentation override the Board's usual insistence that employees in a bargaining unit share a community of interest. Consequently, in order to extend bargaining rights to a remnant group in the most beneficial way possible, the Board in those circumstances may find a bargaining unit appropriate which it might not have found appropriate at a less advanced stage of organization. (See *Ajax and Pickering General Hospital* [1972] OLRB Rep. May 477). In *The Greater Niagara General Hospital*, [1975] OLRB Rep. Jan. 16, the stationary engineers, service employees, nurses and technicians were already organized in four separate bargaining units at the time of application. In view of the bargaining structure in place, the Board denied the applicant's contention that the appropriate unit should be restricted to a number of occupations in the remaining group of unorganized employees and found that to avoid undue fragmentation the only appropriate unit was a tag-end unit. (See also *McKellar General Hospital*, [1971] OLRB Rep. June 312; *Canadian Industries Limited*, [1967] OLRB Rep. Feb. 882, and *Photo Engravers & Electrotypers Limited*, [1969] OLRB Rep. June 395 for additional cases where the Board has refused to find a separate group appropriate for collective bargaining and in view of the bargaining framework already in place at the time of the application either indicated or decided that the appropriate unit would be a tag-end unit.)

12. At the respondent's plant in Peterborough four unions represent employees in four different bargaining units. The United Electrical, Radio and Machine Workers of America (U.E.) holds bargaining rights for the blue collar plant unit consisting of approximately 2,500 employees. The intervener (I.U.E., Local 599) represents a unit of office and clerical employees. The International Federation of Professional and Technical Engineers (I.F.P.T.E.), Local 164 represents the draftsmen and the I.F.P.T.E., Local 166 is the exclusive bargaining agent for all salaried employees designated as Methods and Time Standards and Methods-Planners.

13. The unorganized persons excluded from these bargaining units consist of about 50 secretaries who the employer termed "confidential", approximately 10 security guards and close to 900 persons classified as "Management and Professional". The "Management and Professional" category is composed of approximately 400 positions titled "supervisory" and "managerial", about 300 professional engineers and approximately 200 persons in a sub-category the respondent called "Individual Contributors" which includes, among others, the cost estimators, cost analysts, buyers, value analysts, marketing and engineering assistants and computer and finance personnel.

14. In view of the extensive organization that has already taken place at the respondent's operation, the Board is of the view that in defining the instant bargaining unit it should avoid unnecessary fragmentation. Clearly, having regard to section 11 of the Act, security guards would have to be organized in a separate unit. Furthermore, looking to section 6(3) of the Act the professional engineers are entitled to a separate unit in the event that they become organized. In the interests of promoting collective bargaining stability the Board is satisfied that all other unorganized employees should be grouped together in a tag-end unit.

15. Accordingly, the Board finds that in this application the unit of employees appropriate for collective bargaining is all employees of the respondent at its operation in Peterborough, save and except persons who exercise managerial functions or are employed in a confidential capacity within the meaning of section 1(3)(b) of the Act, security guards, professional engineers and those employees covered by subsisting collective agreements.

16. In order to evaluate the membership strength of the applicant in the bargaining unit found to be appropriate, the Board requests the employer to submit forthwith a list of employees falling within the above described bargaining unit as of the date of application.

1686-78-M Stanley A. Brown, (Applicant), v. Ontario Public Services Employees Union, (Respondent Employees Organization, v. Centennial College of Applied Arts, (Respondent Employer or Agency of the Employer).

Religious objectors – Individual opposition to paying union dues on the basis of religious belief – Individual's beliefs not related to any established religion or any religious teaching or apparently held by any other person – Board satisfied belief sincere and granting religious exemption

BEFORE: G. Gail Brent, Vice-Chairman and Board Members C.G. Bourne and M. J. Fenwick.

APPEARANCES: *Stanley A. Brown for the applicant; no one appeared for the respondent employees organization or the respondent employer.*

DECISION OF G. GAIL BRENT, VICE-CHAIRMAN AND BOARD MEMBER C. G. BOURNE; March 16, 1979

1. The applicant has applied to the Board for an order that he does not have to pay dues or contributions to the employee organization because of his religious convictions or belief. The application is made pursuant to the *Colleges Collective Bargaining Act, 1975 S.O. 1975, c. 74, s. 54* which is reproduced below.

“54. (1) The parties to an agreement may provide for the payment by the employees of dues or contributions to the employee organization.

(2) Where the Ontario Labour Relations Board is satisfied that an employee because of his religious convictions or belief objects to paying dues or contributions to an employee organization, the Ontario Labour Relations Board shall order that the provisions of the agreement pertaining thereto do not apply to such employee and that the employee is not required to pay dues or contributions to the employee organization, provided that amounts equivalent thereto are remitted by the employer to a charitable organization mutually agreed upon by the employee and the employee organization and failing such agreement then to such charitable organization registered as such under Part I of the *Income Tax Act* (Canada) as may be designated by the Ontario Labour Relations Board.”

2. The applicant appeared before the Board and stated that he is Jewish and attends a Conservative Synagogue. He said that, as a matter of personal perception and conviction, he is convinced that to give money to an organization which holds in its hands the ability to say whether someone has employment or not is like paying money to and worshipping another god. The applicant stated that these were his own religious beliefs and that he knew of no prohibition against supporting trade unions or employee organizations in the mainstream of Jewish belief.

3. The application was not opposed by the Union and as a result the Board was left with the task of trying to ascertain the facts and circumstances of the applicant's belief and conviction without the assistance of any examination by the union. The only assistance the

Board had concerning the union's position was a letter to the applicant dated January 23, 1979 which is reproduced below:

"This is to acknowledge receipt of a copy of your application for exemption from the payment of union dues, on the basis of religious convictions.

The Union respects the fact that you are a practising member of the Jewish faith, but we are surprised to learn that payment of union dues would be in conflict with your religious disciplines. I would point out that the trade union movement is extremely well established in the state of Israel and here in Canada members of the Jewish faith play a prominent role in the leadership of many trade unions including OPSEU.

The union cannot condone the application of any member of our bargaining unit for exemption from the payment of dues when the purpose of such dues is to maintain a collective bargaining agent whose purpose is to improve the welfare of employees in the community colleges. At the same time if the strength of your convictions is such that you are prepared to appear and defend your position before a panel of the Ontario Labour Relations Board, the union will not contest your application at a hearing of the panel."

4. The provisions of section 54 of the *Colleges Collective Bargaining Act, 1975* are much broader than those contained in section 39 of *The Labour Relations Act*. The former Act contains no provisions which narrow the circumstances under which such an exemption may be granted. Therefore, the only question before us is whether we are satisfied that the applicant objects to paying dues because of his religious belief or conviction. Under the provisions of the applicable Act, if we are so satisfied, then we must order that he be exempt from paying dues.

5. After hearing the applicant discuss his views, it would appear that he may not fully understand the role of the union and its functions. He seemed to take no objection to the concept of a trade union when viewed as a group activity of some sort, but he objected to having to pay dues because of his perception of the union as usurping functions belonging only to God. The applicant appears to be sincere and unyielding in his opposition to paying dues to a trade union, and he also bases his objection on personal perception rather than on what may be termed accepted dogma.

6. The problem of defining a religious belief or conviction is one which has faced the Board in connection with administering section 39 of *The Labour Relations Act*. Of particular assistance here is *Klaas Stel v. The North York Civic Employees Union, Local 94, Canadian Union of Public Employees v. The Corporation of the Borough of York* [1971] OLRB Rep. 363 and especially the Board's statements at pages 382 – 3 which are reproduced below:

"Counsel's arguments on the secularity and selectivity of the belief are, in reality, addressed to the reasonableness of the belief. Although there may be many who would find it unreasonable and would strongly disagree with it, it is not for the Board to substitute its view as to what con-

stitutes a religious belief for that of the individual. While, from our point of view, we may tend to characterize the belief as secular and selective, we cannot on the evidence find that this is Stel's viewpoint. However unreasonable the belief may appear to some, the evidence impels us to the conclusion that Stel does have this belief and it is one based on his religion.

It was argued, however, that Stel's evidence or affirmation of belief in the witness box must be tested in terms of the consistency and pervasiveness of the belief, particularly where it was not founded on a creed or tenet of faith or a particular church. As we indicated above, we are not persuaded that these are absolute preconditions to the establishment of the religious belief, but they must be useful in some cases where there is a credibility issue. In the present case we have found Stel to be a credible witness."

It has been our policy not to measure an applicant's belief against the tenets of a particular religion but rather to satisfy ourselves that the applicant sincerely holds certain beliefs as a matter of religious belief or conviction. In this case, even though the applicant admits that his beliefs may not be characterized as representing the generally accepted teachings of his religion, he appears to be sincere in his beliefs and bases them on his view of the roles of God and man. We must therefore accept that his objection to the payment of dues is sincerely based on his religious beliefs and he is entitled to his exemption under section 54 of the *Colleges Collective Bargaining Act, 1975*.

7. The Board therefore orders that the provisions of the collective agreement pertaining to the payment of dues do not apply to the applicant and that he is not required to pay dues or contributions to the union. The amounts equivalent to any dues or contributions shall be remitted by the employer to a charitable organization to be mutually agreed upon by the applicant and the union, and the applicant and the union shall notify the employer forthwith of the name of the agreed upon organization. In the event that the applicant and the union are unable to agree upon a charitable organization, the Board will remain seized of the matter for the purpose of designating a charity.

DECISION OF BOARD MEMBER M. J. FENWICK:

1. I dissent.

2. The applicant is an instructor in marketing at Centennial College. He stated that he is Jewish and attends a conservative synagogue. He said that it was his own personal perception and conviction that to pay money to an organization which controls his employment conditions was like paying homage to another God. He had no objection to unions, per se, or to belonging to a union. He could not point to any beliefs held by the religious group or sect that he is a part of or held by other members of that group or sect which led to his objection to the payment of dues. He admitted that there was nothing in the religious teachings of Judaism generally or the sect of which he is a part which precludes support for a trade union.

3. In my view, the applicant was inconsistent. He does not oppose unions but he

does oppose the payment of dues to unions. This indicates that his beliefs allow him to accept the benefits of union representation and the "control", in his view, which his union holds over his terms and conditions of employment. His beliefs do not allow him to pay a share of the costs which are an inevitable part of the union's ability to obtain those benefits for him and exercise its duties on his behalf. The Board must assess the sincerity and credibility of applicants in applications such as these in order to ensure that the legislative provision is not abused. Due to the inconsistency described above, and his failure to point to a belief of his that is shared by other persons in a religious group or sect as part of their religious beliefs, I am not satisfied that the applicant objects to paying dues to the union because of his religious convictions or belief.

4. In my view, the legislature intended that only persons who hold beliefs that are shared by at least some other members of a religious group of which they are a part, and which cause them to object to the payment of dues, should be granted exemptions from the payment of union dues. Religion is a social phenomenon. You cannot have a religion with only one member. The reference to religious beliefs in the legislation must be reference to beliefs held by a person that are shared with other persons who together make up a religion. The Board has always taken a highly subjective approach to the applicant's beliefs, looking only at the beliefs which the individual claims to hold. This makes it too easy to obtain an exemption. This approach makes it possible for a person to come to the Board and state beliefs which they have just invented, and which they claim to be their own, which cause them to object to something about their union, and thereby obtain an exemption. It is virtually impossible to cast doubt upon what a person claims to be their own sincere belief. I do not believe that the legislature could have intended that that be the case. The loss of dues to a bargaining agent in this manner could potentially be an effective way to undermine the ability of the union to fulfil its duties to the employees in the bargaining unit.

5. For these reasons, I would have dismissed the application.

1345-78-U The Ottawa Newspaper Guild, Local 205 of the Newspaper Guild, (Complainant), v. **The Citizen** (A Division of Southam Press Limited). (Respondent).

Duty to Bargain in Good Faith – S.79 – Whether employer's submission of package proposal for settlement constitutes illegal "Boulwarism" – Whether employer improperly bargaining directly with employees – Complaint dismissed

BEFORE: Arthur L. Haladner, Vice-Chairman, and Board Members W.R. Rutherford and W.H. Wightman.

APPEARANCES: C.M. Mitchell, J. Ebner, Katie FitzRandolph, James Scheer, Dave Elder, Richard Labonte and James McCarthy for the complainant; Colin A. Morley, Corinne F. Murray, S.G. Roberts and R.A. Mills for the respondent.

DECISION OF THE BOARD; March 22, 1979

1. This is a complaint brought under section 79 of the *Labour Relations Act* wherein the complainant asks the Board to find that the respondent has violated its statutory obligation to bargain in good faith. In addition to a declaration, the complainant is seeking an order prohibiting the respondent from applying for conciliation.

2. The complaint relates to the conduct of the parties in 1978. As background, however, it is necessary to examine the pattern of the previous negotiations between the parties. The parties have a long-standing bargaining relationship. Since its certification in 1949, the Ottawa Newspaper Guild has negotiated fourteen collective agreements with The Citizen. In 1976, bargaining between The Citizen and the Guild took place within a joint structure. The Guild, together with the Typographers, Pressmen (representing at The Citizen both the press and camera plate units) and Mailers unions, bargained under the auspices of the Ontario Council of Newspaper Unions (the Council). The understanding between the unions was that nobody would settle until everyone had reached an agreement. Prior to October 1976, the four unions bargained through their Council with two newspapers, The Citizen and the Ottawa Journal, The Citizen and the Journal having agreed initially to take a joint approach toward the unions in bargaining. After the alliance between The Citizen and the Journal broke down – over the Council's refusal to discuss other contracts until the matter of the O.T.U.'s jurisdiction was resolved – The Citizen made, on November 10, 1976, "a package proposal for settlement with all unions". That package, which consisted of proposals common to all Council members, together with a series of proposals to individual unions, was preceded by the following "general preamble":

"The Citizen has decided to follow a new bargaining procedure this year. Instead of getting involved in heated arguing, clause-by-clause wrangling and piecemeal concessions, The Citizen has decided to make all of its concessions at once in a comprehensive proposal. This means that instead of striking an aggressive and unrealistic bargaining posture, knowing full well that we will have to move off it, we have moved very far in the direction of the union demands in one jump. We hope this new approach will be welcomed by all employees.

Please do not interpret this as weakness. This is the attitude that has helped to poison labor relations across the country. Both sides are usually afraid to make major concessions for fear that they will be thought weak and thus vulnerable to more demands. Our proposal is not weakness, it is quite the opposite. The Citizen occupies a stronger position in the Ottawa market than ever before and has excellent prospects for the future. This strength enables us to make a very fair offer to our employees who have contributed greatly to the success of the newspaper. But at the same time it gives us the strength to firmly resist any demands which we feel are unreasonable. The company is prepared to be very firm if necessary.

The Citizen hopes that this comprehensive offer will lead to a quick settlement and that we can avoid the bad feelings between management and labor that often result from protracted bargaining. We hope that every employee will have an opportunity to study this document in detail."

The proposal to the Guild was also preceded by a preamble. It stated:

“The Citizen is the best newspaper in Ottawa and is constantly improving. We have the best writing, editing, layout and photography and this is largely the result of the hard work of editorial staff. They produce a newspaper which we can all be proud of and which a growing number of readers prefer.

A large part of the credit for our rapid rise in circulation must also go to the circulation department staff and their distribution efforts. The company thanks them as well.

The Citizen believes that the old contract with the Guild was basically sound. There were some things about it we didn’t like but we were able to live with it as a whole. It allowed management to retain its fundamental rights but at the same time protected employees in all essential areas.

There were some things we wanted to change. For example, we wanted to give employees the freedom to choose whether or not to join the Guild and to exclude from membership most of those in the Guild now performing management work. In the interests of a quick settlement, however, we have withdrawn almost all of our proposals for change in the old Guild contract.

In almost every case we have moved far in the direction of the Guild’s proposals. We are offering to upgrade a number of jobs, increase differentials for performing work outside the contract, increase mileage payments and have accepted Guild wording on many clauses.”

3. Although neither of the witnesses who testified for the complainant could recall whether The Citizen’s offer of November 10, 1976 was distributed to employees (the respondent did not call evidence), it was not disputed that The Citizen’s practice in 1976 was to put out bulletins and that a bulletin was posted by The Citizen on November 25, 1976. The Baord, having regard to these facts, and to the tenor of the above-noted preambles, finds that the November 10th offer was in fact distributed.

4. The bulletin posted by The Citizen on November 25th stated:

“As you all know, The Citizen on November 10 offered to the unions a package proposal for settlement.

It was prepared after we finally were given the opportunity to sit down and discuss with our unions the many proposals submitted.

I say finally, because we were prevented for several months from talking to our unions. They refused to meet with us until problems were “solved” at another newspaper – problems, incidentally, which are not in dispute at The Citizen.

Anyway, despite the long union delays, the Citizen prepared a settlement package with an eye to the dignity and integrity of Citizen employees. Most received it that way.

Others chose to treat it with contempt. Rather than treat it positively – some union members poor-mouthed it purely for posturing purposes.

Don't forget, the company movement in the package offered unprecedented benefits to expired contracts – contracts which, in the main, were some of the best in the industry.

But we cannot and will not accept a response of scorn to a proposal of honor.

Which brings us to today.

Let it be known and clearly understood by all – that there is no more – the company's settlement proposal does just that – or is withdrawn.

It should be further understood that The Citizen would prefer to publish with signed contracts – but we will publish.

Job action by the unions can only lead to an inevitable conclusion jeopardizing not merely the obvious additional benefits offered in the package – but the very issue of job security itself."

It was signed by the publisher, W. Newbigging.

5. On December 1st, the Council agreed to recommend to its members acceptance of the proposal presented by The Citizen on November 10th. That proposal was subsequently accepted by all four unions. Apart from certain options, the unions accepted the proposal without modification. In the Guild's case, the proposal was accepted without any changes whatsoever.

6. It is against this background that negotiations for the renewal of the 1978 collective agreement commenced.

7. In May of 1978, notice to bargain was given to The Citizen by each union separately. There was no Council notice as in 1976. It is clear, however, that the Council was still a force to be reckoned with. Although there were no proposals in common as in 1976, and no common spokesman, there was a representative of the Council in attendance at each of the union's negotiating meetings, and the Council did issue bargaining bulletins. The first of these bulletins, issued just prior to bargaining, stated:

"The member unions of the Ottawa Council of Newspaper Unions are in the process of notifying the Citizen of the unions' desire to commence bargaining for new contracts.

Because of unusual circumstances in the current round of bargaining, the Council has decided that the unions will concentrate on areas of emphasis peculiar to each union.

Therefore, there will be no proposals in common.”

8. James McCarthy, the Council’s chairman during the 1976 negotiations, gave evidence that the Council’s role in 1978 was that of a liaison only. He testified that in 1978 the unions could not agree among themselves on a joint approach to bargaining and further that there was no understanding between the unions as to the unacceptability of a settlement by one prior to a settlement by all. He stated, however, that there had been efforts made by the Guild and others to resurrect the Council as a bargaining agency. He stated further that the Council was poised and ready to assume a bargaining role if that opportunity developed. He did not say that The Citizen was advised of the absence in 1978 of an internal understanding between unions.

9. On May 7th the Guild passed a resolution barring slowdowns or strikes during the course of bargaining. According to the Guild’s evidence, the resolution meant that the Guild would not under any circumstances strike.

10. It is against this background that negotiations for the renewal of the 1976 collective agreement commenced.

11. The first negotiating meeting took place on May 31st. On the union side were the four members of the Guild bargaining team including its chairman and spokesman, Jim Scheer, and Dick Weatherdon, president of the Council. Representing the employer were Syd Roberts, the chairman of The Citizen’s negotiating committee, Howard Gaul, Jim Small and Russ Mills. At the outset of the meeting, Scheer read a prepared statement. The text of that statement, which was distributed to the membership that day – as Bargaining Bulletin #2 – is as follows:

“We have a proposal for you to consider.

In the last round of bargaining, we were told that the company had chosen a new way to bargain; that many things customarily done in bargaining were not being done; that this was a new era in bargaining.

On reflection, we see that your new way to bargain in fact got us a contract in the midst of all that was going on at The Journal and yet without labor disruption at The Citizen.

We were sufficiently impressed with that approach to be willing to try it again in the absence of the sort of labor trouble we had all around us last time.

We think that your approach may give us both a chance to speed up reaching an agreement acceptable to both sides without any strife. We believe this may allow us both to avoid taking extreme positions and agonizingly inching our way to the middle.

Therefore, we solicit from you a complete contract proposal – including money.

We intend to shape our proposals to your approach. We intend to react to you.

We're giving you the initiative to set the tone for this round of bargaining. It may even be helpful if you are in a position to send us your proposals prior to the next meeting. Your doing this will avoid the need for delay before we give you that response."

12. The solicitation from The Citizen of a complete contract proposal prior to any proposals from the Guild constituted a departure from the bargaining procedure followed in 1976 and before. In previous rounds, the Guild had always presented its proposals first. As stated, in 1976 The Citizen's first complete contract proposal was accepted without modification. This departure from the previous bargaining format was intended, Scheer said, to avoid a certain response on the part of The Citizen. Scheer told the Board that the Guild negotiating team had an image in the plant and with other unions – undeserved – as radicals and troublemakers. It was felt, Scheer said, that if the Guild proposed first this round it would provide The Citizen with an opportunity to deprecate its proposals as unrealistic and provocative. By requesting that The Citizen propose first, the committee hoped to avoid such a response.

13. Scheer acknowledged that the Guild was impressed with the approach to bargaining taken by The Citizen in 1976; that it liked the idea of the company presenting a complete contract proposals which would "speed up" the bargaining and obviate the need for an "agonizing inching to the middle". He testified, however, that he did not consider The Citizen's offer of November 10, 1976, to be a take it or leave it offer. This, despite the fact that it was accepted by all unions without modification, and after the publisher had stated: "there is no more – the company's settlement proposal does just that – or is withdrawn." Both Scheer and McCarthy testified that the Guild's acceptance of The Citizen's offer in 1976 was predicated on the situation at the Journal. The Guild, they said, did not wish to fight a war on two fronts.

14. Not surprisingly, The Citizen's reaction to the Guild's rather unorthodox opening was one of surprise. After a time, Mills raised the possibility of a simultaneous exchange of proposals, although he commented that it would be difficult for the company to make an offer until it knew what the union's concerns were. The question of how the parties would approach bargaining was not, however, resolved at the May 31st meeting.

15. The next day, June 1st, Roberts indicated that The Citizen was not prepared at that point to propose first and that it did not wish a simultaneous exchange of proposals. He stated, however, that The Citizen would be agreeable to an exchange of priority items – five from each side.

16. The unions' response, contained in a letter to Howard Gaul, was distributed to the membership as Bargaining Bulletin #3. The text of that letter is as follows:

"The bargaining committee met last night and discussed your response to our May 31st meeting.

We strongly feel that a full contract proposal to us from the company

can be the quickest and least contentious route to a fair and mutually acceptable settlement.

We are surprised – and regret – that the company has not accepted even the compromise offered from your side of the table for a simultaneous exchange of proposals.

We have wrestled with the company's suggestion of exchanging a limited number of priority proposals. We do not think this will lead to a speedy, yet satisfactory, settlement.

It is our feeling that your suggestion was made because of uncertainty you had with our original proposal. To establish good faith so that both of us can reconsider either our proposal or your compromise, we offer the following suggestion: Let us each go through the exercise of listing those clauses where we see no need for any change. This will eliminate unnecessary discussion and demonstrate our readiness to be moderate in this round of bargaining.

We are prepared, if necessary, to waive the meeting dates agreed to, namely, June 21 and 23, to allow sufficient time for your committee to complete this work. If this extra time is needed, we propose meeting in early July.

We hope this might overcome any reservations with our suggestion for full contract proposals and avoid the need for the more traditional approach we had prepared. We believe that if it does not, we shall be constrained by time and circumstance to present any proposals in the more traditional fashion."

17. On June 5th, Gaul responded with the following letter:

"This is in reply to yours of June 2 on behalf of the bargaining committee.

The company is not in a position to make a comprehensive offer for settlement at the beginning of negotiations without some assurance from your side that the number of Guild proposals is severely limited.

When we make a comprehensive offer for settlement it will be precisely that. There is no point in presenting this complete offer if the Guild is going to request 20 or 30 alterations in it.

Since the Guild apparently finds it impossible to give us any assurance that the number of its demands is limited, we suggest that we adopt the form of bargaining that worked so well in 1976 and got us a contract in a climate of labor peace.

We would like you to present us with all of your proposals and to ex-

plain the reasons for the changes you would like to see in the contract. We will then weigh all of your proposals carefully and come back with a comprehensive offer for settlement that includes all monetary and non-monetary items.

This approach worked last time and with good faith on both sides it can work again.

We fail to see the point of listing clauses in which we see no need for change. This appears to us to be simply a way of backing into negotiations. We are more interested in what changes the Guild wants than what it is satisfied with."

18. On June 21st, the Guild met with The Citizen and presented a number of contract proposals – 38 instead of the 80 to 100 that had been presented in previous rounds. Before presenting those proposals, the Guild read the following letter:

"The bargaining committee of the Guild assured the company at the bargaining table on 31 May that the offer it was prepared to make at that time was indeed reasonable; our later acceptance of the company's suggestion for a mutual exchange of proposals and – when the company itself abandoned its own proposal, our subsequent suggestion for an exchange of contract areas in which no modifications were to be proposed would have made clear to the company that the number of our changes was limited.

Your out-of-hand rejection of this approach opens to question whether the company was ever prepared to honor – at any time or under any circumstances – its own platitudes about good faith or the Guild's intention of taking a moderate stand in this round of bargaining.

We now submit our package of proposals; we look forward to your response.

The Guild is not prepared to accept a package-offer from the company that the company refuses to modify in the course of bargaining. If the company cannot trust the Guild, the Guild – reluctantly – cannot trust the company.

Our goal is to arrive at a contract settlement that satisfies the needs of our members; we are not prepared to sacrifice a reasonable settlement on behalf of our members simply for the sake of avoiding labor strife.

We would like to remind the company that, as evidence of good faith, the bargaining committee requested and was granted at the 7 May membership meeting approval of a motion barring slowdowns or strikes in the course of bargaining."

The Citizen responded that it would need time to study the package which ran to 22 pages.

After the meeting, the Guild's proposals were distributed to the membership together with a copy of its letter to Roberts. They were distributed as part of Bargaining Bulletin #4. The preamble to that bulletin stated:

"The bargaining committee's feeling is that the company intends to take rather than to give; the committee is not prepared to permit a reduction of members' rights now contained in the contract."

19. The next meeting took place on July 4th. At this meeting, the Guild was asked by The Citizen for an explanation of its proposals. The Guild's response was to read the proposals with the exception of the proposals on professional activities which were not read. Scheer testified that he did not consider that anything more than a reading was necessary. The professional clauses were not read because, he said, everyone remembered them from the last round. (The wording of the professional clauses was identical to the wording of the clauses proposed by the Guild in 1976.) Apart from four proposals (proposals regarding convention delegates, total market coverage, drivers license suspensions, and a refrigerator for the night cafeteria), all of the proposals concerned matters requested by the union during previous negotiations, although not all in the specific terms then proposed. They all dealt with matters rejected by The Citizen after discussions as to their acceptability. After the Guild's proposals were read out, The Citizen stated that they were, for the most part, unacceptable in principle. There then occurred a discussion of the Guild's proposals for suspended drivers licenses and for a refrigerator for the night shift employees. The union was proposing that in the event of license suspension the employer would have the option of either granting a leave of absence without pay for the duration of the suspension or assigning the employee to duties not involving driving – things which The Citizen had already been doing, although not as a matter of contract.

20. At the end of the July 4th meeting, The Citizen presented its proposals for modification of the existing collective agreement. Those proposals consisted in the main of deletions to the 1976 contract, 34 in all. The Citizen also read out a memorandum which the publisher had sent to Roberts on June 23rd. That memo, which was later posted – without objection from the Guild – read:

"Re: Labor negotiations

Thank you for sending me copies of the Guild letter of June 21 and the attached proposals.

It would be a little more prudent of the Guild executive at this state in contract renegotiations, to refrain from making bald statements about what they will not accept on behalf of The Citizen employees they represent.

To question the company's honor and refer to its avowed intentions to settle the Guild contract peacefully as mere "platitudes" is inflammatory at best.

In the last round of contract negotiations, proposals from both sides were discussed and the company then produced a package proposal for settlement. This method achieved a contract agreeable to both sides.

If, this time, a package proposal for settlement does not gain the Guild membership's approval, everyone should realize, on both sides, just where that kind of impasse inevitably leads.

And let it be clearly stated at the start – so that there are no misunderstandings by anyone – that the continued health and growth of this newspaper in a competitive situation will not be threatened.

No single person, nor group of persons, will be permitted through irresponsible action, to throw into jeopardy all of our jobs which depend so vitally on the continuing leadership of this newspaper in this market.”

21. On July 7th, The Citizen's proposals were distributed to the membership as part of Bargaining Bulletin #5. The proposals were accompanied by the following note:

“Listed below for the convenience of Guild members are the Citizen proposals to The Guild for modifications to the current contract.

The company's proposals are listed on the right, with current contract language reprinted on the left. Where the company's intent is not clear, the bargaining committee has provided an explanation of the effect of the company proposal.

With too few exceptions, the company's initial position in no way contributes to the wellbeing of Guild members.

And it would appear at first reading that nothing the company is asking for is required for the production and distribution of a quality newspaper on time – a concern for quality held, we believe, by The Guild as much as by the company.”

At the hearing, Scheer acknowledged that The Citizen's proposals of July 4th were all clearly understood by the Guild.

22. The next negotiating meeting took place on July 11th. During the course of that meeting, the Guild indicated that it could see no ready agreement inasmuch as The Citizen's proposals were proposals to delete from its rights. The parties then went through the Guild proposals which The Citizen reiterated were unacceptable. The Guild then asked how its proposals could be altered to make them acceptable, and suggested that The Citizen redraft them to accomplish that result. The Citizen responded that that was not its role, but, in any event, it considered the Guild's proposals to be unacceptable in principle and could see no way to modify them. At this meeting, there was further discussion of the Guild's proposals on suspended drivers licenses and for a night shift refrigerator. (It should be noted that while The Citizen did not accede to the union's proposals on drivers licenses – on the ground that it wanted to preserve a discretion – it ultimately opened the cafeteria at night and subsidized it.) At the end of this meeting, the Guild tabled its first monetary proposal – a proposal providing for a 25 per cent increase over one year. Scheer testified that The Citizen would view this proposal as excessive, but that it was intended as a reaction to The Citizen's proposals on contract language which the Guild considered excessive.

23. The next meeting occurred on July 19th. At the outset of that meeting, which was attended by observers from all other unions, Syd Roberts read a statement to the Guild. That statement, which was later posted, read:

"We decided to ask for this meeting today because we find ourselves in a rather awkward position. We have held a number of very productive meetings with the OTU and with the pressmen and mailers and we believe that we are very close to reaching an agreement with them. We have reached the stage where we are ready to present a package proposal for settlement to these unions and are committed to presenting this on Friday.

The problem we have is how to deal with the Guild at this stage. To be frank, the meetings we have had with the Guild haven't been as productive as those with the other unions. We understand what the Guild is seeking but we are still obviously far apart.

We are disturbed at reports we have heard that some Guild members fear that The Citizen's aim is to isolate the Guild from the other unions and then deal with the Guild harshly. We wish to stress most emphatically that this is not the case. The Citizen's aim is to treat all of its unions equally and fairly. No union will be singled out and treated unfairly.

We believe that this fear is genuine, however, even though it is mistaken, and to prove that we plan to treat all unions equally we would like to present a package proposal for settlement to the Guild on Friday at the same time we make the proposals to the other unions.

We do not want to force the settlement proposal on the Guild, however, if the Guild feels that both sides are still too far apart. We believe that all unions, including the Guild, will find our package proposal for settlement fair and as generous as we can make it. We believe that there is a very strong possibility that all unions will net new contracts from the proposals.

To sum up, the ball is in the Guild's court. We would like to include the Guild in our Friday proposal for settlement but are leaving this decision up to the Guild.

If there are any issues that the Guild feels should be discussed in more detail before the proposal to settlement, we are here and prepared to do that today.

At the meeting, The Citizen indicated that, while it was committed to presenting its package proposal for settlement to the other unions on Friday, July 21st, it was prepared, in the interests of facilitating further discussion, to wait until the following Monday, provided the Guild could obtain the other unions' consent to the delay. The Guild indicated that it wished to be included in the proposal and that it wished further discussion of its proposals.

Scheer testified that the Guild had been trying to get a serious contract proposal from the beginning and that it viewed Roberts' statement as a step forward. He testified that, while Roberts had made it clear that the Guild had a choice as to whether or not it wished to be included, he did not appreciate that the offer it would be receiving would be one that could not be altered. He conceded, however, that the Guild had in mind Gaul's letter of June 5th and that it realized the parties had reached the stage described in para. 5 therein. Further, he conceded that the Guild had in mind Newbigging's memo to Roberts. He also allowed that the Guild did feel it was being isolated and that it immediately confirmed this to Roberts. After the Guild indicated it wished further discussions, the meeting continued and the parties once again went through the union's proposals. According to Bargaining Bulletin #6, issued to the membership on July 20th, this produced the "fullest discussion of those proposals that the Guild has had thus far in bargaining". However, no agreement was reached.

24. On the evening of the 19th, the Guild negotiating committee met with the other unions and secured their consent to wait until Monday for The Citizen's proposals.

25. On July 20th, the day the contract expired – by its terms – the parties met again and once more discussed the Guild's proposals which contained several changes to the proposals discussed the previous day. At that meeting, The Citizen indicated that it was encouraged by the progress that had been made and would take everything into account in preparing its proposal for settlement which would be finalized on the 21st. Scheer allowed that at this meeting both parties said everything they wished to say; that there was nothing more to say on either side. The Guild executive left the meeting with the full expectation that it would be receiving, on the following Monday, July 24th, The Citizen's proposal for settlement.

26. On July 24th, The Citizen met in turn with the Pressmen and Mailers, Typographers, and Guild, and delivered its "package proposal for settlement with all unions". The session with the Guild took the same course as the session with the other unions. Before tabling its proposal, The Citizen read a statement which, it advised, was being mailed together with the proposal to the homes of all union members. The statement, which began with a reference to the last round of negotiations during which The Citizen's package proposal for settlement resulted in contracts with all unions "without labour strife", made it clear that the present package had to be accepted or rejected in total, and that it could not be modified. The statement also contained the following pledge from the publisher:

"any union that rejects the package will have the entire proposal withdrawn and we will return to the beginning at the bargaining table. But all unions must be aware that there will be no more on the table at the end of traditional negotiations than there is in this proposal.

A union that accepts this proposal need not be concerned that another union will get more by holding out. *Under no circumstances will a union who rejects this proposal and goes back to negotiations receive one cent more than the union that accepts it, regardless of what pressure the union attempts to put on the company or how long a settlement takes."*

Further, the statement contained a thank-you to all employees for their "co-operation and hard work during the preceding two years" as well as a discussion of The Citizen's profit picture.

27. After the statement was read, the Guild received, without objection, the general proposals to the Guild. The general proposals contained an explanation of the pay package and tables showing the proposed pay increases and the value of fringe benefits in each year of the contract, which was to run for three years. The proposals to the Guild were accompanied by the following preamble:

“One of the greatest concerns of The Citizen is the recent deterioration in its relationship with the Guild. Relations have been getting steadily worse for the past year and are now extremely strained.

In the past year 25 grievances were filed against The Citizen compared to a handful in previous years and many years in which no grievances were filed at all. The Citizen does not consider itself blameless. A few honest errors are inevitable when it comes to administering a long and detailed contract that covers hundreds of people in a complex business such as ours.

Several of the Guild complaints were justified. But far too many were totally groundless. Even legitimate complaints used to be worked out amicably and resolved short of the grievance procedure. But in the past year this has changed. The Guild now rarely even attempts to discuss a problem with us. The first we hear of most problems is when a grievance lands on our desks.

The Citizen can think of nothing it has done in the past year to justify this change in attitude. If anything, The Citizen has attempted to improve labour relations in the past year and this has worked with other unions. The new publisher of The Citizen has instituted smooth and amicable relations with all employees as one of his highest goals. But he will not be intimidated.

The only conclusion we can draw from this unwarranted change in attitude is that some members of the Guild are deliberately trying to create a climate of confrontation with The Citizen. We do not know what their motives are for doing this but we have a grave concern that this could lead to a totally unnecessary labour dispute.

The Citizen is appalled at the reports we have heard that Guild leaders have been telling some members that The Citizen's goal in these negotiations is to isolate the Guild by settling with other unions and then dealing unfairly with the Guild. That is a groundless fabrication.

We ask all employees to draw their own conclusions about our treatment of the Guild from these proposals. Is there a shred of evidence in these proposals that The Citizen's aim is to treat the Guild less fairly and generously than other unions?

We propose exactly the same key pay rate for the Guild as for other unions. And, in fact, because the AIB allowed a smaller increase for the

Guild in the last contract, the Guild has been offered the largest pay increase of any union in this proposal. All of our other proposals are simply aimed at equal treatment for all unions.

If we must reject more of the Guild's demands, it is only because the Guild makes far more demands than other unions and many of the demands would interfere with management's right to run the newspaper.

The Guild demands the right for a Guild member to refuse to do any work that "compromises his integrity". That can never be accepted under any circumstances. Does this mean that we are discriminating against the Guild? Of course not. The Citizen would not want to force anyone to do anything wrong but could never accept hundreds of subjective definitions of "integrity".

If the OTU demanded the right for a member to refuse to paste up a page if he felt a story on it "compromised his integrity" or if the pressmen demanded the right for a member to refuse to handle a plate if something on it "compromised his integrity" these demands would be rejected equally firmly. There can never be any compromise on management's right to manage the newspaper and decide what it contains.

This cannot be stressed enough. The Citizen will not, under any circumstances, hand over any aspect of the management of the newspaper to the Guild. These are to-the-wall issues with us. This proposal proves that The Citizen's goal is to treat the Guild equally on all economic issues and on all reasonable demands. But if the Guild persists in demanding a share of management control we are headed for trouble. We hope this is understood by all.

We have studied the Guild proposals extremely thoroughly and have bent over backwards to accept anything we possibly could. At the same time we have cut our own demands to the bone and are now only seeking a very few changes which are essential. We hope the Guild will find these proposals acceptable because there is simply nothing else we can give in on.

We sincerely hope that the Guild's attitude will change. For our part, we pledge to our utmost to live up to every provision in the new agreement. We look forward to the day when Citizen management has as good relations with the Guild as a union as we do with the vast majority of Guild members on an individual basis.

We are very proud of the job done by our newsroom, circulation department, business office and building staff and this pride continues undiminished even in the present unfortunate climate."

28. Shortly after the proposal to the Guild was tabled, Scheer indicated to Roberts that there might be a drafting problem regarding the meaning of "salary" in certain collec-

tive agreement articles. Roberts responded that The Citizen was amenable to the establishment of a joint drafting committee to deal with any problems of language. The matter was not, however, pursued.

29. Following the meeting with The Citizen, the four unions' bargaining committee met – on the night of the 24th – and resolved to counterpropose.

30. On July 26th, The Citizen posted the following notice:

“Take-it-or-leave-it?”

Several times in the past few days we have heard The Citizen's package proposal for settlement described as a “take-it-or-leave-it deal”. Technically, of course, that's correct in the sense that if the offer is not accepted we will withdraw it and go back to square one at the bargaining table. What we do not like is the implication that there is something unfair or even faintly under-handed about this procedure.

What does not appear to be understood is that *all* labor negotiations eventually reach this “take-it-or-leave-it” stage. In the traditional type of negotiations a company may give a bit one week and a bit the next but it eventually reaches the point where it can give no more and negotiations grind to a halt and the final company offer goes out for a ratification vote on the same “take-it-or-leave-it” basis.

We also hope that it is understood that well-managed companies like The Citizen do not go into labor negotiations blind. They draw up a precise list of what they are prepared to give up ultimately before negotiations begin. They then go into negotiations ready to argue and pound the table with the hope of perhaps getting away with giving up a little less than they are really prepared to give. But they will not give more.

What The Citizen is doing in its new bargaining procedure is putting its bottomline list of what it is prepared to give up ultimately on the table at the beginning. Please believe us, *this is it*.

If we were following the traditional type of negotiations we would undoubtedly have opened with a much lower pay offer and perhaps a minor concession to each union. After a few weeks of balking we would have made a major concession in reducing night hours and increasing night differentials. In another week or so we might have agreed to up the wage offer a bit. A few meetings later we would have tossed in the improved vacations and call-back pay. In another week or so we might have finally upped the wage offer to our bottom-line level. As negotiations ground to a halt we would have agreed to open the night cafeteria and review the dental plan as goodwill gestures and then asked that this final offer be taken to the memberships for a vote.

But we have decided against this procedure. Why? Because it results in a great deal of unnecessary bitterness. When negotiations end we have to go on working together and producing a newspaper. We have decided to give up the chance that we might get away with something less than our bottom-line list in return for a better work atmosphere. We think it will be a good investment.

Sure, our offer is "take-it-or-leave-it". What's wrong with that? It would be at some point anyway."

31. On July 27th, the Guild bargaining committee held a meeting with the membership. Prior to that meeting, which took place at 8:30 p.m., The Citizen had agreed to give employees scheduled for night work time off with pay so they could attend. At the meeting, the bargaining committee spoke in favour of motion that "the Joint Council of Unions at The Citizen counterpropose to The Citizen". The motion, which passed by a vote of 104 to 29, was premised on the assumption that the Guild would be counterproposing in concert with the other unions. As it turned out, however, a split developed between the Guild and the other unions – first with the Pressmen and then with the O.T.U. – and a counterproposal was never prepared. At the July 27th meeting, the Guild membership confirmed the position taken by the union that there would be no strikes or lock-outs.

32. On August 29th, Roberts wrote Scheer the following letter:

"It has been more than a month since the Publisher presented a proposal for settlement to your bargaining committee. To-date we have not heard whether the proposal was accepted or rejected.

I am sure you will agree that a month is sufficient time for a decision on this matter.

If your Union rejects the proposal for settlement that was offered on July 24, 1978, we expect some official notification so that the entire proposal may be withdrawn."

On August 31st, Scheer responded as follows:

"Thank you for your letter of August 29, 1978.

A determination by all unions concerned in response to the proposal has not yet been made.

We shall inform you of our decision as soon as it has been made."

By agreement with the Guild, the O.T.U. responded with an identically worded letter. Scheer allowed that the purpose of those letters was to let The Citizen know that the unions were attempting to proceed together. As of August 31st, the Guild was still hopeful that a joint counterproposal would be prepared.

33. On September 19th, Roberts wrote to Scheer again, this time giving a ten-day deadline for acceptance. The letter stated:

"Once again, I must remind you that the Publisher has not yet had a direct answer to his proposal for settlement presented on July 24, 1978.

In your letter of reply to my letter of August 29th you stated that I would be informed of the Guild's decision as soon as it has been made. Since then, I have had no further word. This proposal cannot be extended to your Union indefinitely, so therefore, under the circumstances, the Publisher wishes to notify the Guild that if there is no firm acceptance or rejection of the proposal within ten days of this date, then the proposal for settlement will be withdrawn."

By September 19th the Pressmen had accepted The Citizen's proposal and the other unions were headed in that direction.

34. On September 22nd, the union scheduled a membership meeting to decide whether to accept, reject or ignore the deadline. Prior to the meeting, which took place at 1:00 p.m. on Sunday, September 24th, Scheer called Newbigging at home to request an extension of The Citizen's offer. Newbigging reacted with the statement that the Guild had had quite a lot of time, that the offer would not be on the table much longer, and that the Guild could either sign it or would be out on the street. Scheer testified that the publisher's statement was made in anger. Scheer thought then, as he does now, that there was no desire on the part of The Citizen for a lock-out or strike, although management would like the Guild to believe that it was prepared for either. At the membership meeting, it was decided by a vote of 37 to 33 to reject The Citizen's proposal. Following that meeting, the following letter was delivered to Roberts:

"The Ottawa Newspaper Guild accepts the Publisher's offer made in the Company's package proposal for settlement with all unions that "we will return to the beginning at the bargaining table."

To implement your offer, we invite you to join us at the table this Wednesday, the 27th, at a mutually convenient time and place.

We suggest 2 p.m. at the Holiday Inn on Kent Street."

35. The next day, September 25th, Roberts wrote Scheer as follows:

"Thank you for your letter of September 24, 1978.

Unfortunately, it is not possible for our committee to meet with your committee on the date suggested in your letter. We, however, will be able to meet with you sometime during the following week. I would suggest that you contact me at the beginning of next week for a mutually agreeable place and date.

According to the bulletin issued by the Guild today, the proposal for settlement offered by the Publisher was rejected by your Union at yesterday's (Sunday, September 24) meeting. In light of this rejection, the Publisher has instructed me to officially withdraw the proposal for settlement dated July 24, 1978."

The bulletin issued by the Guild informed the membership of its letter of September 23rd, and stated:

“The effect of this letter is to resume negotiations that stopped when the Citizen presented its take-it-or-leave-it package proposal on 24 July 1978.

We have accepted the company’s offer, made in that proposal, to return to a traditional form of bargaining with great reluctance; but we had no choice – the company’s offer fell far short of our needs, and the company expressed no willingness to listen to discussion of those needs.

There has been no bargaining at The Citizen; there have been a series of meetings. The time has come for more than meetings. The resumption of bargaining comes with a membership prohibition on avoiding any form of job action while bargaining is in progress, a prohibition to which the Guild bargaining committee and executive is committed.

On two separate occasions – July 27 and Sept. 24 – the membership has voted to reject the company’s proposal, the first time by a vote of 104-29 with one absention, and yesterday by a vote of 37-33.

No member at these meetings has ever argued, or suggested, that the company’s offer was acceptable – or generous, or desirable, or beneficial – as the basis for a contract. The Bargaining committee considers the low turnout and closeness of the vote a sign that members were undecided on how to deal with the company’s arbitrary tactics, not a signal to accept an unsatisfactory proposal.

The Guild bargaining committee will be returning to the company with a set of proposals that it believes are the basis for reasoned and fair bargaining. Our proposals are not excessive; they are merely necessary.

The executive of the local met in special session immediateli following yesterday’s unit meeting and appointed Jim McCarthy to fill the existing vacancy on the bargaining committee.”

36. The next meeting of the parties took place on October 3rd. At that meeting, the Guild presented further modifications to the proposal presented to The Citizen on June 21st. The morning was spent discussing The Citizen’s proposals on professionalism, but with no success. In the afternoon, the parties discussed a number of issues including total market coverage, suspended drivers licenses, and convention delegates, again with no success. (In its proposal for settlement, The Citizen agreed to increase the number of employees permitted to attend union conventions from two to four. The Guild was continuing to insist on five.) At the October 3rd meeting, The Citizen reminded the Guild of the publisher’s pledge and took the position that the Guild’s proposals were still unacceptable in principle. It also rejected several Guild proposals for a reallocation of the monetary package.

37. The next meeting occurred on November 7th. The discussions followed the same course as those on October 4rd, as The Citizen firmly resisted all Guild proposals for changes in its offer of July 24th which it then retabled. After it became clear to the Guild that an impasse had been reached, Scheer asked Roberts what could be done. Roberts replied that a request for conciliation could be made – either by the parties jointly or unilaterally by either. The Guild committee indicated that it would not participate in such a request, and the meeting ended with the union advising that it would be filing a bad faith bargaining complaint with the Board.

38. A request for conciliation services was made by The Citizen on November 9th. Following that request, the Guild bargaining committee advised the Conciliation Branch that it was unable to meet until after Boxing Day as its chairman was going on vacation. As noted at the outset, the union's complaint to the Board sought an order prohibiting The Citizen from applying for conciliation. On December 5th, the first day of hearing, the Guild made an unsuccessful request that the Board issue an order barring conciliation until after it had ruled on the union's complaint that The Citizen was bargaining in bad faith. At that time, the Board was advised that the union had made representations to the Deputy Minister of Labour asking that a conciliation officer not be appointed and that this request had been denied. After the Board denied its request for an interim order, the union continued to make representations to the Ministry, again without success, that a conciliation meeting not be held. On December 27th, the day before the meeting with the conciliation officer was scheduled to take place, the Guild sent a telegram to the conciliation services office advising that it had decided not to participate in the December 28th meeting, nor in any other meeting prior to the Board reaching a decision. On December 28th, the Guild stated in a bargaining bulletin that:

“We have chosen to be absent. We feel these meetings can do no good for the Guild. They would give the Citizen a chance to clear itself of the charge we brought to the labour board. They would not, in our opinion, produce a contract. We view it as extremely unfair to force us to go to a bargaining meeting before the labor board tells us whether we were right in our charge that the Citizen's approach to bargaining broke the law.”

39. A Guild bargaining bulletin, issued after the meeting of November 7th, concluded with the following paragraph:

“KEEP THE GREEN BOOK

Remember the July bargaining bulletin with the tree? The evergreen clause?

The one which says the green book is still in effect during bargaining?

It's still true. Conciliation, suggested by the company as the next step when we met Tuesday, would move us down the road to a free position for a strike, lockout, or changes in the conditions of work.

Our labor board action forestalls that. The contract lives.”

Scheer testified, however, that the union did not go to the Board in order to prevent The Citizen from getting to a free position. It went, Scheer said, to find out whether The Citizen's approach to bargaining constituted bad faith, i.e., whether it was legal for The Citizen to refuse to alter its offer. The decision not to participate in conciliation was taken, Scheer said, because the Guild did not consider that conciliation would be beneficial until it got a ruling from the Board. He allowed, however, that an objective of the union was to protect its case before the Board. The Guild was concerned that if The Citizen made some minor adjustment to its proposal it would be difficult to get the ruling it sought.

40. Since the 1975 amendments to the *Labour Relations Act*, making it possible for bargaining complaints to be brought directly to it, the Board has gone a considerable way toward determining the content of the duty to bargain in good faith. That duty, set out in section 14, requires both employers and trade unions to "bargain in good faith and make every reasonable effort to conclude a collective agreement". Although the good faith bargaining jurisprudence is by no mean complete, the broad parameters of the duty have now been drawn.

41. In *DeVilbiss (Canada) Ltd.*, [1976] OLRB Rep. Mar. 49, the first decision of moment, the Board stated that the duty to bargain in good faith includes not only the obligation of an employer to recognize and accept the status of a trade union once it has lawfully acquired bargaining rights, but also the requirement that the parties meet and engage in rational and informed discussion:

"... the duty assumes that when two parties are obligated to meet each other periodically and rationally discuss their mutual problems in a way that satisfies the phrase 'make every reasonable effort', they are likely to arrive at a better understanding of each other's concerns thereby enhancing the potential for a resolution of their differences without recourse to economic sanctions – the impact of which is never confined to the immediate parties of an industrial dispute. At the very least rational discussion is likely to minimize the number of problems the parties are unable to resolve without the use of economic weapons thereby focusing the parties' attention in the eleventh hour on the 'true' differences between them."

42. The Board, in *DeVilbiss*, made it clear, however, that while the parties must each approach negotiations with the objective of entering into a collective agreement, they are not obliged to have common objectives with respect to the contents of any collective agreements they might enter into:

"The legislation is based upon the premise that the parties are best able to fashion the law that is to govern the work place and that the terms of an agreement are most acceptable when the parties who live under them have played the primary roles in their enactment. In short, the legislation is based upon the notion of voluntarism and ... that neither trade union nor employer is, by virtue of the bargaining duty, obligated to agree to any particular provision or proposal. Therefore, while they must share the common objective to enter a collective agreement, the legislation envisages that they have differences with respect to just what

the content of that agreement should be and those differences may force the parties to have recourse to economic sanctions.”

43. In *DeVilbiss*, and the cases that followed, the Board held that section 14 censures not only tactics destructive of the union’s role as bargaining agent, such as the unilateral alteration during negotiations of terms and conditions of employment (*DeVilbiss*), discriminatory treatment of members of the union’s bargaining committee (*DeVilbiss*), or attempts to bargain directly with employees (*A.N. Shaw Restoration Ltd.*, [1978] OLRB Rep. May 383) but also tactics destructive of the collective bargaining process itself even where there exists on both sides a *bona fide* intention to conclude a collective agreement. The Board has held that a party violates its statutory duty to bargain in good faith if it refuses to explain its positions or their supporting rationale, or fails to provide a justification for its positions or its objections to the positions of the other side. (See in this regard, *Canadian Industries Ltd.*, [1976] OLRB Rep. May 199; *St. Joseph’s Hospital*, [1976] OLRB Rep. June 255; *Pine Ridge District Health Unit*, [1977] OLRB Rep. Feb. 65.) These decisions reflect the Board’s concern that collective bargaining not be carried out in the dark and without the information necessary for rational and informed discussion. They reflect our concern that negotiations not break down because of a lack of understanding of the positions taken at the bargaining table or of their significance to the individuals affected.

44. In keeping with the legislative policy of voluntarism, the Board has concerned itself with the manner in which negotiations are conducted and not with the content of the proposals brought to the bargaining table. The Board has made it clear, moreover, that section 14 is not intended to redress any imbalance of bargaining power that may exist between the parties. As stated in *The Daily Times*, [1978] OLRB Rep. July 604:

“The parties to collective bargaining are expected to act in their individual self interest and in so doing are entitled to take firm positions which may be unacceptable to the other side. The Act allows for the use of economic sanctions to resolve these bargaining impasses.”

In this connection, a distinction has been drawn between “hard bargaining”, the maintenance, out of a concern for one’s own interest, of tough positions, and “surface bargaining”, a going through the motions of bargaining without the intent of concluding a collective agreement. While the latter constitutes a subtle refusal to recognize a trade union, the former is an inevitable consequence of a system based upon free collective bargaining.

45. Finally, the Board has indicated that the existence of the duty to bargain in good faith should not result in a party abandoning the bargaining table for the Board simply because the bargaining process is not working in its favour. A party will not succeed in gaining concessions from the Board that it could not gain during negotiations. Nor will it succeed in recovering opportunities lost through miscalculation or delay. (See in this regard *Pine Ridge District Health Unit* (*supra*), where an agreement was lost because the union chose to hold out for a better wage package, and *Ottawa Journal*, [1977] OLRB Rep. June 309 where the Board refused to exercise its remedial jurisdiction in circumstances where both parties were tardy in seeking relief.

46. The Guild does not allege that The Citizen was bargaining without the intention of concluding a collective agreement. The Guild concedes that The Citizen wished to reach

an agreement but only “on its own terms”. Counsel for the Guild launched a sustained attack on the bargaining strategy which, he say, was employed by The Citizen. Counsel contended that the effect of this strategy was to deny the union any meaningful participation in the collective bargaining process and to reduce its role to that of an advisor which had opportunity only to advocate and recommend. Counsel asks the Board to conclude that this result was intended. He asks the Board to conclude that The Citizen approached negotiations with a closed mind and with a predetermined resolve not to compromise. Counsel contends that The Citizen was not responsive to the Guild’s proposals and that it made no effort to reach an accommodation. He asks the Board to conclude that during the negotiating meetings at which “nothing much was accomplished” The Citizen was simply going through the motions of bargaining until such time as it could safely present its final take it or leave it offer, the terms of which, counsel suggests, had been determined even before the parties met. Counsel asks the Board to conclude that during negotiations The Citizen listened with “deaf ears” and that the Guild bargaining committee kept thinking it was participating in collective bargaining when, in fact, it was not. Counsel argues that The Citizen’s “quick” movement to a final position without earlier concessions or counter-proposals precluded the give and take necessary to reach an accommodation. Counsel contends that no bargaining took place prior to July 24th, and that after that date, the date upon which counsel says bargaining should have commenced, The Citizen had, by reason of its pledge, locked itself into a position from which there could be no escape. By that date, The Citizen had lost, counsel says, all ability to “yield” and thereby to reach an agreement on anything but its previously established terms. Counsel asked the Board to conclude that The Citizen’s objective, in presenting a common offer to all unions, was to induce one union to settle – by making the terms particularly attractive to it – and thereby allow it to determine the terms and conditions which would apply to all others. Counsel contends that, after the Pressmen had accepted The Citizen’s offer, the pledge rendered any subsequent negotiations meaningless. What went on between The Citizen and the Guild was, counsel says, a ritualistic exercise in which the union was attempting “somewhat naively” to find a place for change. Counsel contends that, despite The Citizen’s appearance of giving rationales for its positions, all it did was to continue and assert the position taken on July 24th. Counsel contends that the Citizen’s statement of July 19th, and the statements contained in its July 24th offer, were intended to discredit and further undermine the status of the union’s bargaining committee. Counsel asks the Board to conclude that these statements, and the employer’s statement of July 26th, were designed to influence employees to put pressure on the committee to accept The Citizen’s offer and were, therefore, in violation of sections 56 and 61. Counsel contends that The Citizen’s bargaining strategy, taken as a whole, amounts to a unilateral dictation of the terms and conditions of employment and that it parallels in its essentials the approach found illegal in the *General Electric Company* decision (*General Electric Company and IUOE* (1964), NLRB 192, enforced in *NLRB v. General Electric Company* (1969), 418 F. 2d 736.) Counsel asks the Board to issue an order delaying conciliation and directing the employer to remove any “artificial constraints” to bargaining. Specifically, he asks the Board to direct The Citizen to abandon its pledge and to bargain with the Guild in an effort to reach a “true compromise”.

47. Counsel for The Citizen argues that the evidence does not disclose a breach of section 14 of the Act. He asks the Board to conclude that the filing of the complaint is one in a series of steps adopted by the union in an effort to delay the bargaining process and, as such, is both a violation of section 14 and an abuse of the Board’s procedures. Counsel requests that the complaint be dismissed and that the Board order the Guild to compensate The Citizen for all expenses incurred in these proceedings.

48. Does the evidence support the conclusion that The Citizen approached negotiations with an intention not to engage in the process of collective bargaining with the Guild? The obligation contained in section 14 does not require a party to approach negotiations with a mind open to anything the other side might propose. It requires only that there be an intention to conclude a collective agreement and that the parties meet and engage in rational and informed discussion. Just as The Citizen could not realistically have expected the Guild to respond in a positive manner to its proposals for deletions from the existing contract, it was unrealistic for the Guild to have expected The Citizen to respond in kind to proposals which it had rejected in the past and which it found unacceptable in principle. The Guild's expectations were particularly unrealistic, given its commitment – made prior to the commencement of bargaining – not to strike. As was stated in the *Ottawa Journal*, collective bargaining is necessarily an adversarial process in which disputes are ultimately resolved by resort to economic sanctions. If a party believes that the other side is unable or unwilling to make use of those sanctions, it is unlikely to make the concessions sought. To reach an agreement which truly reflects the bargaining positions of the parties, there must be coercion or the threat of coercion. This reality was put nicely by the Task Force on Labour Relations:

“There is a basic characteristic of the collective bargaining system that is seemingly contradictory. Paradoxical as it may appear, collective bargaining is designed to resolve conflict through conflict, or at least through the threat of conflict.”

That is not to say that collective bargaining is no more than a brute contest of economic might. It is to say that the final results are dictated in no small measure by the relative economic strength of the parties.

49. Despite The Citizen's insistence that it did not engage in the “traditional form of negotiations”, the evidence indicates that there was the required discussion of all issues in dispute. In this case, the failure of the parties to reach an agreement cannot be attributed to an unwillingness on the part of either or both to discuss fully their differences. While the quality of discussion present here can hardly be considered a model for collective bargaining, the evidence indicates that, at the time negotiations broke down, both sides understood clearly what the other was proposing as well as the reasons therefor. The meaning and intent of the employer's proposals was clear from the start. So clear, in fact, that the union was able to provide to its membership explanations of all proposals which were not self-explanatory. Most of the proposals put forward by the union were proposals that had been discussed in previous negotiations, if not specifically then in general terms. The proposals that were new were all the subject of extensive discussion, a discussion which produced either movement on the part of The Citizen or a full explanation of its failure to move. In sum, negotiations were not carried out in the dark and they did not break down because of a lack of understanding.

50. The evidence does not support the conclusion that the employer's proposal of July 24th was arrived at in advance of bargaining or unilaterally. It does appear that the employer decided, at an early juncture, to make its first comprehensive offer its last. However, as stated, that offer was not made until after it had met and provided the union with full opportunity to explain its demands. The Board does not agree that these demands were listened to with deaf ears. The employer made it clear from the outset that it was interested

in the changes the Guild proposed to make, and the evidence does not indicate otherwise. The Guild did succeed in persuading The Citizen of the merits of some of its proposals. That it was not more successful does not mean that the employer did not take seriously its obligation to bargain. As the British Columbia Labour Relations Board stated in *Noranda Metal Industries*, [1975] 1 Can. LRBR 145:

“A party is not required by statute to continue making concessions matching those of the other side (because that would place a premium on outlandish opening proposals for bargaining). The means of extracting further concessions is a strike or lock-out.”

51. The evidence does not support the conclusion that an impasse in bargaining was prematurely reached. The evidence is that the Guild attempted at the opening meeting to obtain from The Citizen a complete contract proposal. That would be, the Guild said, “quickest and least contentious route to a fair and mutually acceptable settlement”. Because the Guild was not prepared to provide assurances that its proposals would be limited in number, The Citizen did not choose to follow that route. In the absence of such assurances, it chose instead to adopt the approach to bargaining taken in 1976 – an approach which the Guild recognized had produced a contract without labour disruption. As stated, The Citizen’s 1978 “package proposal for settlement” was not presented until after the Guild had been given full opportunity to present and explain its proposals. It was not presented until July 24th – almost two months after the commencement of negotiations, and after the existing contract was due by its terms to expire. More significantly, it was not presented until after the Guild had agreed to receive it. At the time it committed itself to presenting its package to the other unions, The Citizen recognized that the meetings with the Guild has not been especially “productive”, and that the parties were still far apart. In expressing its desire to include the Guild in its settlement proposal, The Citizen made it clear that it did not wish to force upon the Guild a settlement and that the ball was in the union’s court. It also extended to the Guild an opportunity for further discussions of its proposals. The Board can only assume that the Guild’s decision to receive, on July 24th, The Citizen’s package proposal for settlement was taken because it considered such action to be in its own best interests. It should be emphasized that, throughout the previous round of negotiations, the unions had acted together in dealing with The Citizen, that the Guild had made efforts prior to the commencement of bargaining in 1978 to resurrect the Council as a bargaining agency, and that the presentation to the unions of The Citizen’s settlement proposal was followed immediately by a joint resolution to counter-propose. The fact that this resolution did not produce the result anticipated by the Guild does not permit it now to turn back the clock and return to a pre-final-offer position.

52. The Board agrees that the effect of the publisher’s pledge was to preclude – at least in the absence of economic sanctions – further concessions on the part of the employer, and that the bargaining which occurred after July 24th was not particularly instructive. But that was a predictable result of the Guild’s decision to receive, along with the other unions, The Citizen’s proposal for settlement. For the Guild to have received that proposal in the belief that it could hold out while others settled, and then bargain by itself for more, was indeed naive, particularly considering its no-strike position.

53. The Board sees nothing improper in The Citizen’s decision to present its settlement proposal to all unions at once. In presenting a package offer, and then refusing to

modify it, The Citizen was repeating a strategy which had not only worked in 1976, it had impressed the Guild – to the extent that it was willing to try it again, although it wished to try it upon its own terms – by having The Citizen present its proposals first. It is true, as counsel for the union points out, that The Citizen's 1976 offer was not accompanied by a pledge from the publisher. It was, however, accepted by all unions without modification after the publisher had stated in no uncertain terms that there would be no more. Although the unions in 1978 were not bargaining under the auspices of the Council, we cannot agree with counsel's contention that The Citizen was bargaining with its unions separately and apart. A representative of the Council was in attendance at all negotiating meetings, the Council did issue bargaining bulletins, and there were, as late as August 31st, attempts by the Guild to have proposals presented in concert. Viewed from this perspective, The Citizen's approach to bargaining can be seen as a legitimate technique to counter what could reasonably have been perceived as a developing common front. In any event, as stated, the Guild chose to be included in the package.

54. The Board does not decide bargaining complaints on the basis of whether an employer's offer is a "fair" one, either in terms of itself or in terms of its relationship to others. To do so would be to assume the posture of an interest arbitrator, something which the Legislature did not intend. Having said that, the Board would observe that the Guild does not appear, at least on the evidence before us, to have been treated less favourably than the other unions. The evidence before us supports The Citizen's contention – stated in its letter of July 19th and in its offer of July 24th – that its objective in bargaining was not to isolate the Guild and then treat it unfairly. The evidence is that the Guild was offered the largest pay increase of any union in the first year – 7.3% at the key rate. In no year was it to receive less than any of the other unions. The Board did hear evidence regarding certain alleged inducements offered to the other unions to get them to settle. But that evidence, all of which was hearsay, does not support the conclusion that other unions were offered a "preferred package".

55. However, even if the Board were to conclude that the Guild got a "bad deal", that would not have supported a finding of "bad faith bargaining". An employer is entitled to attempt to deal differently with its unions. Collective bargaining, as the B.C. Board stated in *Noranda*, is not a process to be conducted in accordance with the Marquess of Queensbury rules.

56. Counsel's complaint about The Citizen's statements of July 19th, and the statements contained in its July 24th offer, raise again the issue of the propriety of an employer communicating directly with its employees during the course of negotiations. The question of the extent to which an employer may engage in such communications was fully canvassed by the Board in *A.N. Shaw (supra)*. In that case the Board stated that although employers must be circumspect when communicating with their employees, especially during negotiations, not all communications between employers and employees are prohibited by the Act. Section 56, prohibiting employer interference with the formation, selection or administration of a trade union, or the representation of employees by a trade union, expressly provides that this very general prohibition does not "deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats or undue influence". It is only when communications between employer and employees go beyond the bounds of legitimate freedom of expression and encroach upon the union's exclusive right to bargain on behalf of its employees that they become illegal. Such communications

become illegal only when they represent, “in reality”, an attempt to bargain directly with employees. Direct bargaining with employees is expressly prohibited by section 59 of the Act.

57. In deciding whether an employer’s communications to its employees can in reality be characterized as an attempt to bargain directly with them, the Board examines not only the nature of the particular communications complained of, but also the particular bargaining context in which those communications occur. Of particular importance is the timing of the communications, i.e., whether they occur early in the negotiations or late.

58. By contrast with the situation in *A.N. Shaw*, the communications complained of here were not issued until after the parties had engaged in discussion of all issues in dispute. They did not occur until almost two months from the beginning of negotiations, and until the employer had committed itself to presenting to the other unions a proposal for settlement.

59. By contrast also with the situation in *Shaw*, the communications here do appear as an attempt by the employer to explain its bargaining position and as an attempt to set the record straight – by dispelling the notion that its objective in bargaining was to isolate the Guild. Moreover, the employer did not, here, as it did in *Shaw*, take it upon itself to disparage the union’s proposals or its bargaining committee. Indeed, any disparagement of proposals and committees appears to have been undertaken by the union. The Citizen did express its concerns about the “climate of confrontation” which it saw developing, as well as its resolve not to compromise on what it perceived as its right to run its newspaper. But in the instant context those expressions fall well within the protection afforded to employers by section 56.

60. Nor should the employer’s statements have been regarded by employees as disparaging either their union or its proposals. As stated at the outset the parties have a long-standing bargaining relationship and one which The Citizen cannot hope, in the foreseeable future, to end. As noted, the preamble to The Citizen’s proposal to the Guild concluded with a pledge to live up to the new agreement and a wish for better relations in the future. In its proposal for settlement of 1976, The Citizen stated that relations with the Pressmen had not been good. In its 1978 proposal, The Citizen expressed the view that those relations had improved considerably.

61. Interestingly enough, the employer’s communications in this case do not appear to have influenced employees, unduly or otherwise, to pressure its bargaining committee into accepting the employer’s proposal. If anything, the communications appear to have had the opposite effect. Scheer testified that the membership meeting of July 27th – at which the membership voted in favour of a motion that the unions counterpropose together to The Citizen – was called in response to a petition from employees. The intent of that petition was, Scheer stated, to have the committee “clearly and swiftly” reject the employer’s offer. Scheer testified that he personally was in favour of accepting the offer – on the ground that it represented the best contract available in the circumstances. Others, however, thought differently.

62. In assessing the propriety of The Citizen’s communication to employees, it should not be forgotten that the practice of both parties throughout negotiations, and in the previ-

ous round, was to regularly communicate with employees. Scheer allowed that this practice had gone on without either side ever complaining. The employer's communications were, moreover, consistent with its practice of encouraging maximum participation by employees in the decision as to whether to accept or reject its proposals. It will be recalled that the employer agreed to allow employees scheduled for night work time off with pay so that they could attend the July 27th meeting.

63. Finally, it should not be forgotten that the employer's proposal of July 24th was mailed out without objection from the Guild. While the evidence does not disclose whether that proposal was mailed before or after the meeting with the Guild, it is clear that the union was advised. As stated, The Citizen's 1976 package was also distributed to the employees prior to its acceptance.

64. The Board finds that in the circumstances of this case the employer was not attempting to bargain directly with its employees and that its conduct did not undermine the viability of the union as exclusive bargaining agent. We find that the employer's communications were not in violation of section 14, or of any other provision of the Act.

65. Before concluding this portion of our decision, the Board wishes to comment briefly on the publisher's statement to Scheer. In *Pine Ridge* (supra), the Board had this to say about comments made in the course of negotiations:

"Nor will every heated comment made in the charged atmosphere of the bargaining room be a breach of the duty to bargain in good faith. Words may sometimes betray bargaining in bad faith, but the Board must view the words carefully and in the light of all of the surrounding circumstances. Those familiar with collective bargaining know that fighting words are sometimes no more than form of posturing for desired effect. And at other times they merely reflect the inevitable fact that when people form hard lines on opposite sides of a tough issue tempers will flare, notwithstanding the best of intentions.

Lastly it must be recognized that people are not equally gifted in diplomacy and good manners. While obvious insults may, in some cases, form the basis from which to infer a contempt of the opposite party that is tantamount to a refusal to recognize their status at the bargaining table, or to truly communicate with them, it would be unrealistic to find a breach of section 14 of the Act in every tactless remark that offends one of the parties. Freewheeling verbal encounter can be a valuable antidote to stalemate in collective bargaining. Therefore, occasional gaucherie and inadvertent slips are inevitable and must, within reason, be tolerated."

66. In this case, the statement complained of was made in response to a request made of the publisher at home – and on a Sunday morning – for an extension of an offer that had been outstanding, without a reply, for almost two months. In the Board's view, the statement, which was made in anger and was not even insulting, did not betray the presence of bad faith bargaining. The statement threatened a resort to economic sanctions – in the event the employer's proposal for settlement was not accepted. Such a threat cannot, in the

circumstances of this case, be considered premature. In any event, it does not appear to have been taken seriously.

67. Our conclusion from the evidence is that The Citizen did not fail to bargain in good faith and make every reasonable effort to conclude a collective agreement. Accordingly, the complaint, insofar as it relates to the conduct of the employer, is dismissed.

68. The Board has commented that the bargaining which occurred after July 24th was not particularly instructive. This is not to imply, however, that we condone in any way the union's decision not to attend at conciliation. Conciliation was the first opportunity for the parties to meet and discuss their differences in the presence of a third party, and, while it may well be that the meeting with the conciliation officer would not have advanced matters one iota, it hardly behooves a party which is complaining of the other's intransigence at the bargaining table to refuse to attend at a government requested meeting. This is particularly so where, as here, the union has attempted unsuccessfully to have the Board bar conciliation on an interim basis and where, as here, it was openly desirous of protecting its case before the Board. Of further concern is the fact that the refusal occurred after conciliation had already been delayed in order to accommodate the union's timetable. By refusing to attend at conciliation, the Guild foreclosed an opportunity for a settlement prior to a determination by the Board. Such conduct could not, moreover, have been calculated to alleviate the employer's concern regarding the "climate of confrontation". The Board considers that, in the circumstances of this case, the union, in refusing to attend at conciliation, fell short of the standard of good faith bargaining imposed by the Act. In the circumstances, however, the Board does not consider that any useful purpose would be served by the issuance of a remedial order against the union.

69. As for counsel for the respondent's request for costs, even if the Board does have the general authority to award costs, we are not convinced that this is an appropriate case for the exercise of that authority. In the Board's opinion, the union's complaint was aimed not so much at "stopping the clock" – to forestall conciliation – but at turning it back – to a pre-impasse situation. There was, in our opinion, a sincere belief that the employer's bargaining practices were "unfair" and that they might have been in violation of the Act. That being the case, the Board cannot characterize the complaint as frivolous or vexatious. Accordingly counsel's request for costs is denied.

0006-78-R Gerard Lafortune, (Applicant), v. Labourers International Union of North America, Local 493, (Respondent), v. **Corporation of the Municipality of Casimir, Jennings, Appleby**, (Intervener).

Practice and Procedure – Failure to give respondent union notice of vote resulting in new vote ordered.

BEFORE: E. Norris Davis, Vice-Chairman, and Board Members C. G. Bourne and M. J. Fenwick.

APPEARANCES: *Steve D. Horton and Thomas L. W. Orendorft for the applicant; M. A. Ross for the respondent; K. R. Valin and A. Brisson for the intervener.*

DECISION OF THE BOARD; March 27, 1979

1. The Board, by decision of December 15, 1978, directed a representation vote to be held and representatives of the parties met on January 5, 1979 to discuss arrangements in respect to the conduct of such vote. At this meeting there was agreement on the date of January 30, 1979 as the day of the vote with February 6, 1979 as an alternate date. The intervener objected to the respondent appointing its International representative as scrutineer and by subsequent letter to the Board requested that such appointment be disallowed: the respondent requested the addition to the voters' list of one, Tom Pothier, an employee then absent due to illness and the intervener objected to such inclusion. Following the meeting the parties individually, by letter, informed the Registrar of the results of the meeting, with the respondent's letter in such regard being dated January 16, 1979.

2. The Registrar on January 9, 1979 sent letters to the applicant and to the intervener confirming that the vote would be held on January 30, 1979. Due to an administrative oversight no such confirming letter was sent to the respondent, nor was the disputed status of the respondent's intended scrutineer or the status of Pothier dealt with specifically. The respondent in evidence established that it was not until the morning of January 30, 1979 that its International Representative, Mr. M. A. Ross, had actual knowledge that January 30th had been fixed as the date of the vote. The respondent's representative did not attend at the vote and the Returning Officer appointed one, Rheal La Fleur, an employee in the bargaining unit to act as scrutineer on behalf of the respondent. The vote was held and the ballot box sealed without the counting of ballots.

3. Ross testified on behalf of the respondent that by letter dated January 16, 1979 the respondent apprised the Registrar of the results of the meeting of the parties on January 5, 1979, and that on January 22nd or January 23rd he called his Toronto based solicitor to inform him that no information had been received from the Registrar in respect to holding of the vote. His solicitor advised him "to be patient". Ross was then absent from his office until the morning of January 30th as a result of business responsibilities elsewhere and testified that he received no further communication from his solicitor.

4. On arriving in his office the morning of January 30th Ross was informed that there had been a number of phone calls from residents of the community advising that the vote was scheduled for that day. Ross attempted unsuccessfully to contact the solicitor for

the intervener, but was successful in contacting the office of the applicant's solicitor who had left the office to attend the vote and the secretary read to Ross the Registrar's letter fixing the date and arrangements for the vote.

5. Ross states he then spoke by phone with a Labour Relations Officer and received a return call at 10.15 a.m. January 30th that the vote was proceeding but was unable to secure any information in respect to the outstanding matters of his own status as scrutineer or of Pothier's eligibility to vote.

6. By hand-delivered letter dated January 30th the respondent's solicitor requested the delay of vote until a later date based on the absence of notice to it of the conduct of the vote and its consequent lack of opportunity to electioneer or to monitor the conduct of the election. Such letter also alleged that there had been no posting of notice to employees of the election but this allegation of fact was withdrawn at the opening of the hearing. The Registrar determined that the vote should proceed and that the ballot box should be sealed.

7. Ross testified that, in fact, no electioneering efforts had been set in motion consistent with the respondent's general practice in these matters to initiate such activities only after receiving notice from the Registrar as to the date fixed for the conduct of the vote, and therefore argues that the absence of notice was prejudicial to the respondent and may have adversely affected the respondent's position in the outcome of the vote.

8. We are of the opinion that the respondent's argument is well-founded. The respondent was entitled to receive notice of all the arrangements fixed by the Registrar in respect to the conduct of the vote, and the fact that the respondent was aware that two alternate dates had been agreed upon by the parties is not in itself wholly predictive of the Registrar's final determination, nor in our view a satisfaction of the entitlement of notice.

9. The intervener argued that the respondent's solicitor, following the phone call of January 22nd or 23rd had an obligation to forthwith contact the Board about the lack of notice, and that the respondent cannot hide behind this failure. In our view this case is similar to *Adventure Construction Limited* [1975] OLRB Rep. April 371, where a party was held responsible for the omission of his solicitor's failure to comply with defined time limits. There was no defined time limits involved here and additionally, when one considers that the respondent's letter relative to the arrangements for the vote had gone forward to the Board on January 16th it would be unlikely that the period from January 16th to January 22nd or 23rd would be regarded as an inordinate lapse of time for final arrangements to be fixed and notice given. In any event, the onus to give notice was not that of the respondent.

10. In respect to the objection taken by the intervener to the appointment of the respondent's scrutineer we note that it is the Board's general practice not to interfere in respect to such appointments subject to subsequent argument in the given case that the existence of such appointment may have interfered with the expression of the employee's true wishes. While we believe this practice should be well known particularly by those appearing regularly before the Board, we must agree that it would have been better had the existence of such practice been drawn to the parties attention in response to the objection taken.

11. The Board directs that the representation vote taken on January 30, 1979 be set aside and that the Registrar cause the ballots cast in that vote to be destroyed. The Board

further directs that a new representation vote be taken amongst the employees of the intervener. Those eligible to vote are those employed on the date of the vote in the voting constituency set out in the Board's decision of December 15, 1978 in this matter.

12. The matter is referred to the Registrar.
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1600-78-R Virginio Fadelli, (Applicant), v. Canadian Paperworkers Union and its Local 1199, (Respondent), v. **Independent Paper Convertors Inc.**, (Intervener).

Sale of Business – Timeliness – Whether notice given following sale of business has same effect as certification and bars application

BEFORE: Ian C.A. Springate, Vice-Chairman and Board Members H.J.F. Ade and D.B. Archer

APPEARANCES: *K.W. Hogg for the applicant; Harold F. Caley and Gary Bucella for the respondent; W.G. Phelps, P. Rusak and J. Cunane for the intervener.*

DECISION OF THE BOARD; March 15, 1979

1. This is an application under section 49 of The Labour Relations Act for a declaration terminating bargaining rights.

2. It is agreed that the applicant is an employee of Independent Paper Converters Inc. ("Independent Paper") and that he comes within a bargaining unit represented by the respondent trade union ("the union"). At issue is the timeliness of the application. The facts relevant to this issue are not in dispute, albeit they are somewhat complex.

3. On May 17, 1976 the union entered into a collective agreement with Top Paper Products Limited ("Top Paper"). This agreement expired on October 31, 1977. On August 9, 1977 the union served written notice to bargain on Top Paper and subsequently the union and Top Paper met for the purpose of negotiating a new collective agreement. Such an agreement, however, was never entered into. On December 9, 1977 Top Paper was put into receivership. During the months of January and February, 1978 Independent Paper purchased the plant, machinery and some of the inventory of Top Paper from the receiver. On June 4, 1978 Top Paper was petitioned into bankruptcy.

4. On June 30, 1978 the union wrote to Independent Paper in an attempt to open negotiations for a collective agreement. The relevant portion of the letter states as follows:

"We understand that sometime this year you purchased the business formerly carried on by Top Paper Products Ltd. As you may be aware Top Paper Products Ltd. had a collective agreement with our local which expired October 31, 1977. Notice to bargain under this collective

agreement was sent to the prior employer on August 9, 1977 and we have had two meetings in an attempt to conclude a collective agreement.

Inasmuch as we have been unsuccessful in concluding a collective agreement we are enclosing the expired agreement and would be prepared to meet with you during the week of July 10, 1978 in order to attempt to conclude a collective agreement."

5. When no response was received to the above letter, the union applied to the Board, pursuant to section 55 of the Act, for a declaration that it held the bargaining rights for the employees of Independent Paper. On November 14, 1978 the Board issued a decision wherein it found that a "sale" of a business, within the meaning of section 55 of the Act, had occurred between Top Paper and Independent Paper. The Board also went on to declare that Independent Paper was required to bargain with the union with a view to making a collective agreement.

6. On November 30, 1978 the union requested that the Minister appoint a conciliation officer, and such an appointment was made on December 28, 1978. This application, however, was filed on December 20, 1978 and thus in our view its timeliness is not affected by the appointment of the conciliation officer.

7. In their arguments, counsel referred to a number of sections of the Act. For convenience the sections primarily relied upon are set out below:

55.-(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 13 or 45, sells his business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 13 or 45, as the case requires.

(10) For the purposes of sections 5, 49, 51, 53 and 112, a notice given by a trade union or council of trade unions under subsection 3 or a declaration made by the Board under subsection 6 has the same effect as a certification under section 7.

49.-(1) If a trade union does not make a collective agreement with the employer within one year after its certification, any of the employees in the bargaining unit determined in the certificate may, subject to section 53, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit.

8. It was the contention of counsel for the union that the notice which it served upon Independent Paper on June 30, 1978 constituted a notice to bargain as contemplated by section 55(3) of the Act, and that by virtue of section 55(10) the giving of the notice had, for the purpose of section 49, the same effect as a certification. Section 49 provides that following its certification a trade union has at least one year free from the possibility of timely termination applications in which to try to negotiate a collective agreement. Accordingly, contended counsel, in that this application had been filed within one year of the giving of notice on June 30, 1978, it was not a timely application.

9. Counsel for the Independent Paper argued quite forcefully that the application was timely. It was his contention that the letter sent to Independent Paper by the union on June 30, 1978 was not notice as contemplated by section 55(3). He based this contention on two grounds. One was that in the letter the union did not mention section 55(3), did not specifically claim successor rights and did not specifically refer the company to its responsibilities under section 55. The other ground was based on counsel's contention that a section 55(3) notice to bargain can only be given to a successor employer during the period when a collective agreement between the predecessor employer and the union is still in operation. In this case the collective agreement between Top Paper and the union had expired prior to the union serving its notice to bargain on Independent Paper. In support of this position counsel relied on the latter part of section 55(3) where it states:

"... and the trade union ... is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or *the renewal, with or without modifications, of the agreement then in operation* and such notice has the same effect as a notice under section 13 or 45, as the case requires."

(Emphasis added)

10. Counsel for Independent Paper also contended that if the Board adopted his position concerning the question of when section 55(3) applies, then it would have the effect of avoiding for the purposes of this case an apparent inconsistency between sections 55(3) and 55(10). In this regard counsel noted that whereas section 55(10) states that the filing of a notice under section 55(3) has the same effect as a certification, section 55(3) itself merely states that it has the same effect as a notice under section 13 or 45.

11. Counsel for the applicant adopted the arguments put forward by counsel for Independent Paper. In addition he contended that it was incumbent on the Board to concern itself with the merits of the application, namely with the question of whether or not the employees desire to continue to be represented by the union, and that the Board should not allow a procedural time limit to thwart the substantive right of employees to terminate the bargaining rights of a union which they no longer support.

12. The question as to when an application can be made to terminate a union's bargaining rights is an important one, and reflects two competing industrial relations concerns. One of these concerns is that employees not be straddled with a trade union which they no longer desire to have represent them. The other concern is that a trade union be given a reasonable opportunity to negotiate a collective agreement, and particularly a first collective agreement, free from the disruptive effects of a termination application. In our view the de-

tailed provisions set forth in the Act concerning the timeliness of termination applications reflects an attempt on the part of the Legislature to strike a balance between these two concerns. This being the case, we are of the view that it would be improper for this Board not to give effect to the time limits specifically provided for in the Act.

13. In dealing with the issue of the time limits applicable in these circumstances, we would note that we are satisfied that the union's letter to Independent Paper dated June 30, 1978 satisfies whatever form may be required for the giving of a notice under section 55(3). While admittedly the letter makes no express reference to section 55(3), it does clearly state that the union formerly had a collective agreement with Top Paper, that the business of Top Paper had been purchased by Independent Paper and that the union was now desirous of concluding a collective agreement with Independent Paper. Taken together these statements clearly amount to the giving by the union "... to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal ... of the agreement then in operation ...", which is all that section 55(3) requires.

14. We see little merit in the contention that the letter of June 30, 1978 is not a notice under section 55(3) in that it was not given while the collective agreement between the union and Top Paper was still in operation. Section 55(3) in essence provides that where a trade union has given, or is entitled to give, notice to bargain to an employer, and the employer sells his business, then the union is entitled to serve notice to bargain on the purchaser of the business. At the time of such a sale it may be that no collective agreement will be in operation, or that the term of an existing agreement will not yet have expired. It is our view that in either of these circumstances a proper section 55(3) notice can be given. In this regard we would simply note that while that portion of section 55(3) stressed by counsel for Independent Paper does refer to a notice of a desire to bargain for a renewal of an agreement then in operation, the section also makes reference to a desire to bargain with a view to making a collective agreement. In our view, the letter sent by the union to Independent Paper on June 30, 1978 constitutes a written notice of a desire to bargain with a view to making a collective agreement and as such constitutes proper notice under section 55(3).

15. Section 55(10) provides that notice given under section 55(3) has the same effect as a certification for the purposes of section 49. Section 49, in turn, provides that no termination application can be made until after a year from a union's certification. It follows, in our view, that no termination application can be made within one year of the giving of notice to bargain to a successor employer pursuant to section 55(3). We would note that we see no conflict between this result and the statement in section 55(3) that such a notice has the same effect as a notice given under section 13 or 45. The giving of notice under section 13 or 45 triggers a requirement to bargain in good faith under section 14 and also generally acts as a precondition to the appointment of a conciliation officer. The giving of a section 55(3) notice to bargain has the same result. However, quite apart from this it also for certain other purposes acts as a certification of the union under section 7. There simply is no conflict.

16. Having regard to all of the above, we are satisfied that no timely termination application can be made until at least a year has passed from the time that the union served written notice to bargain on Independent Paper. This application, having been filed prior to the expiry of a year, is therefore untimely.

17. This application is hereby dismissed as being untimely.

1755-78-M Labourers' International Union of North America, Local 527, Applicant, v. **John Entwistle Construction Limited**, Respondent, v. Employer Bargaining Agency, Intervener.

Abandonment – Arbitration – Construction Industry – Collective Agreement – Section 112a – Union filing section 112a referral seeking application of province wide agreement to respondent employer – Board dismissing referral – Union had abandoned bargaining rights and therefor respondent not plugged into province wide agreement

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members H. J. F. Ade and W. F. Rutherford.

APPEARANCES: *F. Manoni and George Harrop for the applicant; John Entwistle and Allan Rock for the respondent and G. Grossman and L. Howes for the intervener.*

DECISION OF THE BOARD; March 14, 1979

1. In this referral of a grievance under section 112a of The Labour Relations Act, the applicant has been authorized by the Labourers' International Union of North America (hereinafter referred to as the "trade union") to act on its behalf. The applicant is seeking adjudication of a claim for wages, fringe benefits and union security payments. It claims that payments are owing under the terms of an agreement which is alleged to be a provincial agreement within the meaning of section 125(e) of the Act.
2. The employer bargaining agency with which the alleged agreement has been negotiated was represented at the hearing and was made an intervener to the proceedings.
3. The basis of the applicant's claim is that it has bargaining rights for employees of the respondent and by virtue of those rights and section 134(2) of the Act the respondent is bound to the provincial agreement. In support of the applicant's claim, the application contained the statements that the "trade union" had been certified by the Board on October 22, 1970 and that there had been a "no board" report issued May 19, 1971 (the latter being in respect of a collective bargaining dispute between the trade union and the respondent).
4. The reply filed by the respondent contested the existence of any collective agreement binding the applicant and the respondent and held, as a consequence, that the Board was without jurisdiction to hear the application.
5. The preliminary representations of the parties at the outset of the hearing, taken together with their filings, made it apparent that there was, in addition to the respondent's challenge to the Board's jurisdiction, a threshold issue of whether the applicant held bargaining rights in respect of employees of the respondent. Consequently, the Board advised the parties that it would first hear their evidence and argument on this threshold issue. Having heard and considered the parties' submissions, the Board advised them at the hearing of its decision to dismiss the application on the grounds that the trade union had abandoned its bargaining rights. The Board's reasons therefor follow.
6. The trade union was certified by the Board on October 22, 1970 as bargaining agent for a unit of construction labourers in the employ of the respondent in Board Area

#6, which includes the city of Cornwall. It attempted unsuccessfully to negotiate a collective agreement with the respondent and by letter dated May 19, 1971, from the Deputy Minister of Labour, was advised that the Minister was not going to appoint a conciliation board in the dispute. This meant that after sixteen days had elapsed from the date of the letter the trade union was in a position to engage in lawful strike action and, similarly, the respondent could lock out its employees.

7. Since that time, the only activities in which the trade union has engaged has been to picket some of the job sites where the respondent has been engaged either as a general contractor or a sub-contractor and to seek by other means to obtain the co-operation of clients and potential clients of the respondent in not letting contracts to it in the absence of a collective agreement with the trade union or the applicant. The applicant maintains that the sole purpose of these activities was to obtain a collective agreement with the respondent. The Board finds little evidence to support that conclusion. In fact, the evidence could support equally well the conclusion that the picketing was a joint effort of various building trade unions, including the trade union or the applicant, protesting against non-union contractors being used on the projects.

8. Following the issuing of the "no board" report and until the filing of this application, neither the trade union nor the applicant has sent notice to the respondent of a desire to bargain, met with the respondent or submitted any proposals that would form the basis of a collective agreement. Nor have they exercised any other rights under the Act, whether on their own behalf or on behalf of their members. There is no evidence before this Board that either the trade union or the applicant has any membership support amongst the respondent's employees.

9. The respondent has continued to operate its business in Cornwall and vicinity, which is within the Board area for which the trade union was certified, since that certificate was issued. The respondent has determined the terms and conditions of employment for the employees working in the bargaining unit described in the certificate without consulting with or obtaining the consent of either the applicant or the trade union ever since the "no board" report was issued. During that period, the respondent has adjusted wage rates on an average of twice per year.

10. The principle of abandonment of bargaining rights has been established for many years in the Board's jurisprudence. This principle finds expression in the expectation that a trade union, once it acquires bargaining rights by certification or voluntary recognition, actively will promote those rights. Conversely, failure to use the rights may result in the trade union's loss of them. See the Board's decision in *J. S. Mechanical*, Board File No. 1677-78-R (as yet unreported) at paragraph 4 for a comprehensive outline of Board cases dealing with this principle.

11. The issue of whether a trade union has abandoned its bargaining rights must be determined on the particular facts of each case. The Board has looked to a variety of factors in the bargaining relationship as indicators of whether bargaining rights have been abandoned. Some of these are canvassed in paragraph 5 of *J. S. Mechanical*, *supra* and include: the length of the union's inactivity; whether it has made attempts to negotiate a collective agreement or sought to administer an existing collective agreement; whether terms and conditions of employment have been changed by the employer without objection from the

bargaining agent; and whether there are any extenuating circumstances which might explain an apparent failure to assert bargaining rights.

12. In the instant case, the evidence establishes that, since May 1971, the only apparent attempts of the trade union to exercise its bargaining rights were sporadic picketing activities on three separate projects in 1971, 1973 and early 1976 (the latter lasting for just under six months) and the contacts with clients and potential clients of the respondent. Although the employer appeared unwilling to negotiate a collective agreement following certification of the trade union, it had available avenues under the Act which it could have used to require the employer to recognize its bargaining rights. Instead, it appears to have chosen to rely on the application of economic sanctions, which it was lawfully free to do. Even if the Board were to conclude that the picketing in 1971 was a direct attempt by the trade union to get the respondent to sign a collective agreement (and from the evidence it is not prepared to do so), there is no other evidence that at any time since then either the trade union, or the applicant acting on its behalf, has pursued actively the bargaining rights conferred on the trade union by the certificate issued on October 22, 1970.

13. In all of the circumstances of this case, the Board finds that the trade union has abandoned its bargaining rights and may not now revive them. Since the trade union does not have bargaining rights for employees of the respondent, the respondent would not be bound to the province-wide collective agreement, if proven, to which the trade union is bound. Therefore there is no basis for the applicant to seek relief on behalf of the trade union under section 112a of the Act.

14. The application is dismissed.

0994-77-R Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230 affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, (Applicant), v. **Indusmin Limited**, (Respondent).

Certification – Employee – Whether subject persons are dependent contractors

BEFORE: R. A. Furness, Vice-Chairman, and Board Members H. J. F. Ade and E. Boyer

APPEARANCES: *Harold F. Caley, Bruno Teichmann, Philip J. Wolfenden, Gerald Wilkes and Lyle Nuan for the applicant; N. Mac L. Rogers, Q.C., Alex Morrison, Martin Scisizzi and Gaston Berube for the respondent.*

DECISION OF THE Board; March 26, 1979

1. The applicant has applied for certification with respect to a group of dump truck operators. The respondent manufactures and sells construction aggregates at its yard in Scarborough, Ontario. The Board has considered the report of the Labour Relations Officer and the representations of the parties.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.
3. The applicant adopted the position that the persons for whom it seeks bargaining rights are: Ferdinand Gubasta, Leonard McKeown, Joe Montisano, Don Staneland, Emilio Marsella, Mario Perri, William Veitch, Bob Platt and Phillip Theriault.
4. The respondent adopted the position that none of these persons are employees (including dependent contractors) and maintained that these persons fall outside the provisions of The Labour Relations Act.
5. At the time when they were examined the nine persons referred to in paragraph three had been associated in their work with the respondent for periods ranging from a few months to ten years. None of them has signed an agreement with the respondent with respect to the work they perform for the respondent.
6. These nine truckers, for the most part, commenced their association with the respondent by contacting the dispatcher. Contacts were initially established after indications that "we are hiring trucks"; the request to take the job of a friend who had died; the advice of a friend that there might be a job and advice from the respondent and that if an individual bought a truck he would be welcome to work at the respondent's yard.
7. The respondent's yard is open five days each week from 7:00 a.m. to 5:00 p.m. for about eight months each year. The yard is closed for lunch between noon and 12:30 p.m. During periods of peak activity the truckers, when so instructed, report to work prior to 7:00 a.m. On a typical day a trucker arrives at the respondent's yard and takes on fuel for his truck. When the dispatcher has a load to be delivered the name of one of the truckers is called out and his truck is loaded by a front-end loader which is operated by one of the respondent's employees. The trucker is given a delivery slip on the way out. The delivery slip bears the trucker's number and indicates the load and location for delivery. The dispatcher may also indicate the route if the load is destined for a new location. The dispatcher returns the hand copy and the trucker takes two copies with him. When the trucker reaches the point of delivery he requires the slip to be signed and dumps the load of material. On his return to the yard the trucker gives a copy of the slip to the dispatcher and returns to the line in preparation for the acquisition and delivery of another load. Each working day the truckers line up and await the directions of the dispatcher. These nine truckers are from time to time during peak periods supplemented by other truckers.
8. In the area of control the primary point of contact between the truckers and the respondent occurs through the dispatcher. However, on occasions the truckers do have contact through the respondent's manager. When a trucker is ill or experiences problems with his truck the practice is to telephone the dispatcher. Messrs. Staneland and Veitch characterized this practice as a requirement of the respondent. If a trucker does not call in then the dispatcher contacts him. The dispatcher controls the load and type of material to be loaded. If a truck is overloaded the dispatcher tells the trucker to dump some of his load. The truckers have some responsibility for collecting for C.O.D. orders. However, they receive payment from the respondent regardless of whether a customer pays the respondent. The respondent determines whether payment from a customer is to be made by cheque or cash. Where payment is by cheque the respondent is the payee thereon. In the event that a

trucker arrives at a location and the customer decides that he no longer needs the load, the trucker is required to telephone the dispatcher who decides whether to re-route the load or bring it back to the yard. When a trucker is told by the dispatcher to return a load to the yard he is paid for both the outgoing and incoming portions of the journey. During slack periods the respondent may ask the truckers to go to other yards. Similarly, during slack periods the truckers may make arrangements to go to another yard. The dispatcher decides if a trucker is not required at the respondent's yard and whether he may go to another yard. When a trucker wishes to leave early he reports to the dispatcher. If he is required to stay then he remains and is available for delivering loads. When a trucker wishes to leave early he gives a reason for his request.

9. The truckers are paid by the respondent on a basis of tonnage. They receive maps from the respondent. These maps are divided into zones and a rate sheet sets forth the applicable rate for each zone. All of the truckers are paid on the same basis. They receive payment from the respondent every two weeks in the form of cheques and accompanying print-outs from a computer. The accuracy of the amount on the cheques may be checked against the delivery slips which the truckers retain in their possession. Deductions are made from these cheques where gasoline has been purchased from the respondent at its yard. Most of the truckers purchase their gasoline from the respondent because it is convenient and because it is at least as cheap as the cut-rate gasoline in the area. However, not all of the drivers are aware of the price they pay for gasoline. The cheques also reflect any work which the truckers may have performed in the respondent's yard. It appears that not much work is done in the yard by the truckers. Under certain circumstances the cheques may include amounts with respect to time when the truckers are required to wait at the sites before dumping their loads. This concept was introduced by the respondent and is paid at the termination of the respondent.

10. Each spring the sales manager calls a meeting of the truckers and goes over the rates for the new season. William Veitch is the truckers' representative to discuss various matters of mutual interest between the truckers and the respondent. At this meeting the sales manager presents a map indicating the zones and a schedule of rates which the respondent feels it can afford. There is no private discussion about the rates between the sales manager and any of the truckers. If any of the truckers disagree with rates they are free to leave and work at another location.

11. The truckers own their own trucks. Eight of the truckers drive tandems and one drives a single-axle truck. The truckers have financed the purchase of their trucks without the respondent's assistance. Robert Platt has a partnership arrangement with his son. Each of them owns a truck and they work "under a kind of joint account". The truckers are required by the respondent to make provision for their own insurance and they pay for their own R licences, PCV licences, cartage licences and road licences.

12. None of the trucks indicate the respondent's name or colours. All of the truckers have their names or addresses or telephone numbers on their trucks. The truckers are responsible for repairs to their trucks. The respondent makes no objection when minor repairs are made to trucks in the yard.

13. Some of the truckers have on occasions employed persons to drive their trucks. Such employment of other persons, however, is infrequent. None of the truckers employed

other persons to drive their trucks on the date of the filing of this application. For example, Mr. Gubasta previously hired a part-time driver several years prior to the date of the filing of this application. Mr. McKeown has never employed other persons to drive his truck with respect to work for the respondent. On one occasion he entered into an arrangement with another drive to use his truck during the removal of snow for the Department of Transport. No one else has driven Mr. Montisano's truck prior to the date of the making of this application. No one else has driven Mr. Perri's truck since he started performing work for the respondent. No one else drives the trucks of Messrs. Staneland and Theriault. None of the truckers own more than one truck.

14. The respondent exercises discipline over the truckers. Examples of this have occurred in response to complaints by customers. On one occasion Mr. McKeown was not paid for delivering a load because he refused to drive through a swamp. He was not disciplined merely for declining to drive through a swamp but because he had not telephoned the dispatcher before returning to the respondent's yard with the load. Mr. Marsella had an argument with a customer and was told not to let it happen again because it was a bad reflection on the respondent "to have a thing like that". Mr. Veitch was disciplined by being told that he could not haul to a particular job due to a disagreement he had with a customer. He was not permitted to haul to that customer for four weeks.

15. The truckers are subject to the respondent's rules in the yard with respect to loading and dumping. In conformity with the laws of this Province they are required to wear hard hats during the loading operations.

16. The respondent employs its own salesmen to solicit business. The truckers do not generally solicit business for the respondent. The only exception to this occurs when the dispatcher on occasions asks the truckers to inquire whether a customer wants more material. The truckers do not advertise for business. However, Messrs. McKeown and Marsella have business cards. Neither has a listing in the telephone directory other than for his name as an individual. Mr. Marsella's business cards were printed prior to his association with the respondent and he hands them to friends to inform them of his address. Mr. McKeown seldom hands out his business cards which refer to a partnership with his son. The business cards contain both his own and his son's telephone numbers. He passes out his business cards in connection with snow removal and when anyone is interested in his truck for work on a Saturday.

17. With respect to sources of income, all of the truckers are heavily dependent on their income from the respondent while the respondent's yard is open. It is true that during the winter months some of the truckers supplement their income with snow removal. On these occasions, however, there is not usually any conflict in the performance of their work for the respondent. On one occasion when there might have been a conflict between snow removal and work for the respondent, Mr. McKeown sought and obtained clearance from the respondent's dispatcher. It was significant that many of the truckers articulated a preference for working with the respondent throughout the year if the respondent operated on this basis. Mr. Gubasta obtains ninety-five per cent of his income from the respondent and five per cent from snow removal. Mr. McKeown obtains most of his income from the respondent. The remainder of his income comes from snow removal. He has only engaged in snow removal since the respondent closed its yard from December to March. All of Mr. Montisano's income has been obtained from the respondent during 1975, 1976 and 1977 up to the

date of the making of this application. Mr. Staneland has obtained virtually all of his income from the respondent in 1975 and 1976. Mr. Mansella has earned most of his income from the respondent and Mr. Perri does not haul material for anyone else except for snow removal. Messrs. Veitch and Theriault obtain part of their income from hobby farming. Mr. Veitch obtained by far the largest portion of his income from performing work for the respondent. He received a small portion of his income from snow removal. Mr. Theriault has not hauled for anyone else since he commenced performing work for the respondent. Since Mr. Platt commenced performing work for the respondent he has not hauled for anyone else except for snow removal.

18. The truckers file their income tax returns and claim depreciation and operating expenses with respect to their trucks. Since the respondent does not make any deductions with respect to income tax, Canada Pension Plan, Health Scheme payments, Unemployment Insurance premiums and Workmen's Compensation, the truckers (for the most part through bookkeepers) address themselves with respect to liability under these headings.

19. Under section 1(1)(ga) a person need not be employed under a contract of employment in order to be a dependent contractor. In addition, the fact that the nine truckers furnish their own vehicles is no longer determinative of their status. The emphasis in section 1(1)(ga) is placed upon a person performing work or services for another person for compensation or reward on such terms and conditions that he is in a position of economic dependence upon and under an obligation to perform duties for such a person more closely resembling the relationship of an employee than that of an independent contractor. In order for a person to be determined to be a dependent contractor within the meaning of section 1(1)(ga) such a person must not only be in a position of economic dependence but must also be under an obligation to perform duties more closely resembling the relationship of an employee than that of an independent contractor.

20. The nine truckers own their vehicles and bear the responsibility for maintaining them. However, each of them receives all or the majority of his income from the respondent. With the exception of snow removal the nine truckers either work with the respondent or (rarely) work at yards where the respondent has succeeded in finding work for them. The snow removal presents little or no inconvenience to the respondent. Even when any of the truckers engages in snow removal the respondent is notified if there is any conflict. It is clear that the respondent still has first call on their services. The snow removal is not a factor which removes these nine truckers from economic dependence on the respondent. The absence of entrepreneurial or business initiative by the nine truckers underlines their economic dependence on the respondent. There is no real attempt to solicit business and to extend their business horizons beyond the respondent and the snow removal. Their work either flows through the respondent or is undertaken at a time when the respondent has discontinued its operations for the winter.

21. The obligation of the nine truckers to perform services for the respondent more closely resembles the relationship of an employee than that of an independent contractor. A practice has evolved whereby the truckers inform the dispatcher when they are, for one reason or another, unable to be present at the respondent's yard. If their conduct towards a customer is unsatisfactory, as determined by the respondent, a form of discipline is imposed. The truckers who return from a location without dumping their loads and who do not contact the respondent about this do so at the peril of not being paid for delivering their

loads. During the eight months that the respondent operates its yard the nine truckers neither perform nor solicit business to any appreciable degree from any other source. Their perception of the respondent is far closer to an employer-employee relationship than to an arm's length relationship normally found between independent contractors and a source of business.

22. The truckers are paid on a ton basis according to various zones which are marked on maps. They receive payment every two weeks based upon their deliveries regardless of whether the respondent receives payment from its customers. The truckers have no meaningful input into the rates for their deliveries. They are in effect told the rates that the respondent is prepared to pay at a meeting at the commencement of the season. There is no doubt that the rates for deliveries are set unilaterally by the respondent.

23. The Board finds that the nine truckers are in a position of economic dependence upon, and under an obligation to perform duties for, the respondent more closely resembling the relationship of an employee than an independent contractor. These persons are dependent contractors within the meaning of section 1(1)(ga) and are accordingly, by virtue of section 1(1)(gb), employees under The Labour Relations Act.

24. Some of the truckers on occasion use another person to drive their trucks. There is nothing to indicate that this has occurred with respect to work performed for the respondent. In any event, even if other persons were used to drive their trucks on the date of the making of this application, it is doubtful whether such occasional use would cause the Board to change its determination as to the basic nature of the relationship. See the *Superior Sand, Gravel & Supplies Ltd* case, [1978] OLRB Rep. Feb. 119; the *Canada Crushed Stone* case, [1977] OLRB Rep. Dec. 806; and the *Flintkote Company of Canada Limited* case, [1978] OLRB Rep. Sept. 822, where the occasional use of a temporary driver did not affect the finding by the Board of the existence of the relationship of dependent contractor and employer.

25. The respondent also adopted the view that there is a conflict between the *Combines Investigation Act*, S.C. c. 23, and the definition of "dependent contractor" in The Labour Relations Act. In the *Abdo Contracting Company Ltd.* case, [1977] OLRB Rep. April 197, the Board addressed itself to this question and stated at page 200:

This case requires use to explore the outer limits of the *Labour Relations Act*. The purpose of this statute, as set out in its preamble, is to "further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees". The Act itself provides a structure for the organization of individual workers into combinations. Collective action by workers, once regarded as amounting to an illegal conspiracy, has been legitimized, the underlying rationale being the need to protect the individual employee from the worst extremes of the labour market. The countervailing power of collective bargaining can now be used by workers to obtain improved wages, hours of work, and other working conditions.

The *Labour Relations Act*, however, was never intended to insulate entrepreneurs from economic competition by allowing that class of person to act in combination. Such combinations not only fall outside the purview of collective bargaining legislation, but they are also expressly restricted by the federal *Combines Investigation Act*. Collective bargaining policy, thus, expressly encourages combinations, while competition policy operates in the opposite direction. Given these two quite different policies, it then becomes important to identify the outer limits of our own statute, the *Labour Relations Act*.

In the *Dufferin Materials & Construction Ltd.* case, [1978] OLRB Rep. March 278, the Board also stated at pages 278-9:

The question of the legislative competence of the Province and the alleged conflict with the *Combines Investigation Act* was dealt with by this Board in *Superior Sand, Gravel & Supplies Ltd.*, (Board File No. 1308-76-R Feb. 8, 1978). As was noted in that case, although the Board has a duty not to apply the *Labour Relations Act* so as to extend its operation beyond the areas of provincial jurisdiction, it is not the function of the Board, but rather of the Superior Courts, to adjudicate upon the constitutional validity of the Board's own statute. And in *Canada Crushed Stone* (File No. 1070-77-R Dec. 8, 1977) the Board declined to apply the "dependent contractor" provisions of the *Labour Relations Act* to owner-drivers who are also employers by virtue of the fact that they operate more than one truck through the use of their own employees. The very effect of that decision is to avoid the sponsorship of pricing arrangements under the guise of collective bargaining among entrepreneurs contrary to the *Combines Investigation Act*. The respondent's motion in respect of the constitutional validity of the dependent contractor provisions of the *Labour Relations Act* is therefore denied.

26. The Board has considered the most detailed arguments of the respondent and finds no reason to adjudicate upon the constitutional validity of any part of The Labour Relations Act.

27. The Board further finds that all dependent contractors working at or out of the respondent's facility at 150 McCowan Road, Scarborough in Metropolitan Toronto, save and except dispatchers and persons above the rank of dispatcher, constitute a unit of employees of the respondent appropriate for collective bargaining.

28. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on October 3, 1977, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

29. A certificate will issue to the applicant.

0974-78-R Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada, (Applicant), v. **J. C. Milne Const. Co. (Canada) Inc.**, (Respondent), v. Labourers' International Union of North America, Local 506, (Intervener).

Certification – Collective Agreement – Whether intervener has bargaining rights – Memorandum purporting to incorporate terms of nonexistent collective agreement not itself a collective agreement – Memorandum constituting voluntary recognition agreement and not invalid even though covering only one employee – Agreement unit description including vacant classifications not in circumstances improper support for union – Application dismissed

BEFORE: Ian C. A. Springate, Vice-Chairman, and Board Members H. J. F. Ade and O. Hodges.

APPEARANCES: *Henry M. Pollit and Giovanni Balanzin for the applicant; Conrad Scott for the respondent; A. Minsky, B. Fishbein, L. Greenspoon; F. Amis and G. Cragg for the intervener.*

DECISION OF THE BOARD; March 6, 1979

1. The name: "Milne Construction Canada Inc." appearing in the style of cause of this application as the name of the respondent is amended to read: "J. C. Milne Const. Co. (Canada) Inc.".
2. The Board finds that this is an application for certification within the meaning of section 108 of The Labour Relations Act.
3. The applicant is seeking to be certified as the bargaining agent for all cement masons and cement masons' apprentices in the employ of the respondent in Board Area #8. On the date of the making of the application the respondent had three employees in Board Area 8 who were engaged in performing cement finishing work on a mausoleum in Thornhill. It is the applicant's contention that these three employees were cement masons and came within the proposed bargaining unit.
4. The intervener objects to the application on the grounds that it already has the bargaining rights for all of the respondent's employees in Board Area 8 engaged in cement finishing work. In support of this claim the intervener relied upon a "memorandum of understanding" between itself and the respondent dated July 14, 1978. In this memorandum the respondent voluntarily recognized the intervener as the bargaining agent for all of its construction labourers, and all of its employees engaged in cement finishing, waterproofing or restoration work in Board Area 8. As will be detailed later, this particular memorandum was in fact the third "memorandum of understanding" executed by the respondent and the intervener on July 14, 1978.
5. The applicant challenged the validity of the document filed by the intervener insofar as it purports to give the intervener bargaining rights for employees engaged in cement finishing work, and in this regard relied on section 52 of the Act. Section 52 provides that a voluntary recognition agreement may be challenged during the first year of its operation on

the grounds that the trade union which entered into it was not at the time entitled to represent the employees in the bargaining unit covered by the agreement.

6. On July 14, 1978, the date on which the respondent voluntarily recognized the intervener, the respondent had in its employ in Board Area 8 a total of five employees, all working at the mausoleum job site. Of these five employees, four were carpenters and one was a construction labourer. This construction labourer was a member of the intervener. None of the five employees on the site appear to have been engaged in performing cement finishing work.

7. Subsequent to July 14th, the respondent employed the three individuals already referred to to perform some cement finishing work. It is perhaps reflective of the rivalry between the applicant and the intervener for employee loyalties that although the three individuals involved were referred to the job site by the intervener, all were long-standing members of the applicant. It is also interesting to note that they were referred to the job site by Mr. Frank Amis, an organizer for the intervener who was at one time a business agent of the applicant union.

8. As already noted, the document being relied on by the intervener was in fact the third memorandum executed by the respondent and the intervener. At the hearing there was raised the question of whether one or all of these memoranda could be characterized as a collective agreement. In our view, none of the memoranda can properly be so characterized. While at first glance it might appear that each of the memoranda adopts the terms of another collective agreement so as to thereby be sufficient as a collective agreement in its own right, a close reading of the documents indicate that in fact no such adoption of the terms of any other agreement is achieved. In the case of the first memorandum to be signed, it purports to incorporate the terms of a collective agreement which as far as we can discern was never in existence. Indeed, with the exception of the recognition clause set out in the memorandum, very little of this document makes any sense at all. The second and third memoranda are almost identical. Each purports to bind the parties to the terms of a collective agreement between the Toronto Construction Association and the intervener until such time as either one of two specific events occur. One of these events, however, had already occurred *prior* to the signing of these memoranda, namely, the expiration of the section 70(1)(a) time periods insofar as they related to certain negotiations for a provincial agreement. Further, quite apart from these considerations, section 133(2) of the Act is quite clear in providing that subsequent to April 30, 1978 no collective agreement could be entered into which was referable to the industrial, commercial or institutional sector of the construction industry unless it was a provincial agreement as contemplated by subsection (1) of section 133. All parties appeared to approach this case on the basis that the work on the Mausoleum came within the industrial, commercial and institutional sector. Accordingly, none of the memoranda can be considered to be a collective agreement covering the work in question. We are of the view, however, that each of these documents, if considered by itself, can be viewed as a voluntary recognition agreement.

9. The first memorandum was brought to the job site in the morning of July 14, 1978 by an official of the intervener and executed at that time by the respondent's construction supervisor. The document was then taken to the intervener's office where it was signed by Mr. Gilbert Cragg, one of the intervener's field representatives. Article 1 of the memorandum states as follows:

The Employer hereby recognizes the Union as the sole and exclusive bargaining agent for all its Cement Masons, Waterproofers and Restoration employees engaged in the Province of Ontario.

10. Later in the day Mr. Cragg came to the conclusion that the initial memorandum was "not sufficient". As a result, he put together the second memorandum and took it to the job site where it was signed both by himself and the respondent's construction supervisor. Article 1 of this memorandum reads as follows:

The Employer hereby recognizes Local 506 as the sole and exclusive bargaining agent for all of its construction labourers engaged in (Board Area 8) save and except non-working foremen and persons above the rank.

11. Later in the day on July 14th the second memorandum was reviewed by Mr. F. Amis, who as already noted is an organizer for the intervener. At the time Mr. Amis concluded that the recognition clause contained in the memorandum was not wide enough in scope. A third memorandum was then prepared identical to the second one except for its recognition clause. Mr. Cragg signed this document and then in the evening of July 14th Mr. Amis took it to the home of the respondent's construction supervisor who also signed it. Article 1 of this memorandum states:

The Employer hereby recognizes Local 506 as the sole and exclusive bargaining agent for all of its construction labourers, including Masons' or Bricklayers' attenders, and all employees engaged in cement finishing, water proofing or restoration work, engaged in (Board Area 8) save and except non-working foremen and persons above the rank.

12. We are satisfied that the first memorandum when it was signed constituted a voluntary recognition agreement covering a bargaining unit of cement masons, waterproofers and restoration employees engaged in the Province of Ontario. There is nothing before us, however, to indicate that on July 14, 1978 the respondent employed any such employees anywhere in Ontario. Accordingly, we are of the view that the intervener did not at the relevant time represent any employees of the respondent in such a bargaining unit and that the respondent and the intervener were not entitled to enter into such a voluntary recognition agreement.

13. The second memorandum is a voluntary recognition agreement covering construction labourers in the employ of the respondent in Board Area 8. On July 14, 1978 the respondent did in fact employ one construction labourer in Board Area 8 and that construction labourer was a member of the intervener. At the hearing, however, the question was raised as to whether a bargaining unit must include at least two employees before a valid voluntary recognition agreement could be entered into. In this regard reference was made to section 6(1) of the Act which stipulates that upon an application for certification any bargaining unit determined by the Board must consist of more than one employee. Section 6(1), however, is referable only to the certification process and makes no reference to voluntary recognition. The Labour Relations Act recognizes the voluntary recognition process as a completely separate method by which trade unions can acquire bargaining rights. Therefore, statutory limitations on the Board's ability to define a bargaining unit on an applica-

tion for certification cannot be assumed to also restrict the right of an employer and a trade union in drafting the bargaining unit in a voluntary recognition agreement.

14. Section 52 of the Act does contain a requirement that at the time a trade union is voluntarily recognized it must represent "the employees in the bargaining unit". The use of the word "employees" in this requirement does suggest that more than one employee must be in the bargaining unit for which a union is voluntarily recognized. However, such a suggestion ignores the effect of section 27 of *The Interpretation Act* which reads, in part, as follows:

In every Act, unless the contrary intention appears

- (j) words importing the singular number or the masculine gender only include more persons, parties or things of the same kind than one, and females as well as males and the converse.

15. In our view The Labour Relations Act does not express an intention that the word "employees" should not also be interpreted to include a single employee. Indeed, if anything the contrary is true. Because of the fluctuations in employment (particularly in the construction industry) it sometimes happens that there is only one employee in a bargaining unit, even though at the time the union obtained its bargaining rights there were two or more employees. Notwithstanding this fact, the term "employees" is used throughout the Act with respect to provisions which would appear to be applicable to a single employee in an established bargaining unit. An example of this is section 42 of the Act which states that a collective agreement is "binding upon the employer and upon the trade union that is a party to the agreement ... and upon the *employees* in the bargaining unit defined in the agreement" (emphasis added). In light of these considerations we are satisfied that the term "employees" when used in The Labour Relations Act should be interpreted to include a single employee. Therefore, we are of the view that the reference in Section 52 of the Act to a union being entitled to represent the employees in a bargaining unit at the time it is voluntarily recognized also has reference to a single employee within such a bargaining unit, and that accordingly, there is no impediment in the Act to having an employer voluntarily recognize a trade union as bargaining agent for a bargaining unit consisting of only one employee.

16. Having regard to this conclusion, and to the fact that the only construction labourer employed by the respondent in Board Area 8 on July 14, 1978 was a member of the intervener, we are satisfied that when the second memorandum was signed by both the respondent and the intervener it became valid and binding voluntary recognition agreement.

17. This then brings us to the third memorandum, which is the one being relied on by the intervener to establish its bargaining rights with respect to employees engaged in cement finishing work. One of the issues raised with respect to this document was whether a voluntary recognition agreement could cover a number of classifications of employees even though at the time it was signed only one classification of employee was actually employed.

18. In construction industry certification applications the Board generally defines bargaining units in terms of a single trade or classification of employee. This is a reflection both of the traditional craft structure of the industry as well as of the special provisions re-

specting craft bargaining units set forth in section 6(2) of the Act. In certain circumstances the Board will exercise its general authority under section 6(1) of the Act to determine appropriate bargaining units, to describe a construction industry bargaining unit comprised of more than one employee classification or craft. Leaving aside the matter of displacement applications, however, the Board's practice is to only include a particular craft or classification of employee within a construction industry bargaining unit if at least one employee belonging to that craft or classification was employed in the relevant geographic area on the date of the making of the application. Thus, if an employer employed only construction labourers, the Board would describe the bargaining unit solely in terms of construction labourers.

19. As already noted, however, certification by this Board is only one of the ways in which a trade union can acquire bargaining rights, the other being voluntary recognition. Further, nothing in the Act gives the Board any supervisory authority over the bargaining units described in voluntary recognition agreements. Even section 52 of the Act, when empowering the Board to inquire into the question of whether a trade union was entitled to be voluntarily recognized to represent a unit of employees, appears to contemplate that the Board will concern itself with the bargaining unit as agreed to by the employer and the trade union. Thus, the fact that the Board would not have described the bargaining unit in the same terms as agreed to by the respondent and intervener in the third memorandum cannot by itself be grounds for concluding that the recognition agreement is improper or invalid.

20. In addition to the above observations, we would also note that as a general proposition we see nothing irregular about including a vacant employee classification within a voluntarily recognized bargaining unit. Indeed, the Board itself in industrial certification applications frequently describes the bargaining unit in terms of "all employees", save and except certain specific exclusions, with the understanding that employees who later fill vacant classifications as well as yet to be created new classifications will come within the bargaining unit. Having said that, however, we do recognize that here we are concerned not with an industrial concern but rather with the construction industry where unions generally organize on a craft basis and where craft distinctions are jealously guarded. The question this raises is whether the craft structure of the construction industry somehow makes improper voluntary recognition agreements which purport to cover vacant classifications. Can it be said, for example, that in agreeing to such a bargaining unit an employer is contributing improper support to a trade union or that the parties to the voluntary recognition agreement are improperly interfering with the rights of persons who may be employed in the future to select a bargaining agent?

21. When questioned as to these matters, counsel for the intervener submitted that any employer who employed only construction labourers who were members of the intervener was entitled to recognize the intervener for a bargaining unit described in terms of any number of classifications or crafts, notwithstanding the fact that when members of a particular craft later came to be employed the trade union which usually represents such employees would be barred from seeking to be certified to represent them. We see no need, in the circumstances of this case, to either adopt or reject such a broad assertion. Suffice it to say we do not believe that the description of the bargaining unit contained in the third memorandum suggests that in agreeing to it the respondent was giving improper support to the intervener or that the respondent and intervener were improperly seeking to interfere

with the rights of persons who might subsequently be employed to select their bargaining agent. We would note in this regard that although the intervener primarily represents construction labourers, it and other locals of the Labourers' International Union of North America in this Province also represent not inconsiderable numbers of employees engaged in cement finishing, waterproofing and restoration work. Indeed, when the Minister of Labour designated the Labourers' International Union of North America and its Ontario Provincial District Council as the employee bargaining agency for a number of affiliated bargaining agents, one of which is the intervener, for the purposes of province-wide bargaining, the designation was described as being "to represent in bargaining all construction labourers, including masons' or bricklayers' tenders, and all employees engaged in cement finishing, waterproofing or restoration work, represented by the following affiliated bargaining agents ... in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario."

22. Having accepted that the respondent and the intervener could enter into a voluntary recognition agreement covering a bargaining unit in the terms described in the third memorandum, the only question remaining is whether anything turns on the fact that some hours prior to the signing of the third memorandum they had already entered into a voluntary recognition agreement covering only construction labourers. We think not. We see no objection to expanding the scope of a voluntary recognition agreement, particularly where the expansion does not affect any existing employees. See: *The Kelvin-Thompson Company Limited*, [1966] OLRB Rep. Feb. 882 and *Power Controls Division – Midland-Ross of Canada Limited*, [1967] OLRB Rep. March 954.

23. Having regard to all of the above we are satisfied that on July 14, 1978 the respondent and the intervener entered into a valid voluntary recognition agreement which covered all employees of the respondent engaged in cement finishing work. The employees for whom the applicant seeks to be certified were at the relevant time engaged in cement finishing work and thus, in our view, were covered by the recognition agreement. This application does not meet the requirements for a timely displacement application under section 5 of the Act. Accordingly, the application is hereby dismissed.

1792-78-R International Association of Machinists and Aerospace Workers, Local Lodge 2412, Applicant, v. **Longyear Canada Inc.**, Respondent, v. United Steelworkers of America, Intervener.

Sale of a Business – Bargaining Unit – Intermingling – Amalgamation of companies giving rise to intermingling of employees and integration of operations – Vote ordered

BEFORE: Pamela C. Picher, Vice-Chairman and Board Members W. H. Wightman and D. B. Archer.

APPEARANCES: Alex Walker, George Drennan and Brian Parker for the applicant; K. R. Valin, Vic Merriman, Kevin Vaughan for the respondent and Alick Ryder, James Keuhl, Dora Chadbourn and Wayne Ryan for the intervener.

DECISION OF THE BOARD; March 13, 1979

1. The name "Longyear Canada Inc. (Formerly – Canadian Longyear Limited)" appearing in the style of cause of this application as the name of the respondent is amended to read: "Longyear Canada Inc."

2. This is an application under section 55 of The Labour Relations Act. The applicant union, the Machinists, Local Lodge 2412, alleges that a sale of a business within the meaning of section 55 of the Act has taken place and requests the Board to declare, pursuant to section 55(6) of the Act, that as a result of an intermingling of employees instituted by the respondent employer following the sale one bargaining unit should replace the two which now exist. The applicant further asks the Board to find that the applicant union is the appropriate bargaining agent for the employees in the new bargaining unit. Alternatively, the applicant requests the Board to order a vote of the employees to determine which union should hold the bargaining rights.

3. The relevant sections of the Act are as follows:

55(6) Notwithstanding subsections 2 and 3, where a business was sold to a person who carries on one or more other businesses and a trade union or council of trade unions is the bargaining agent of the employees in any of the businesses and such person intermingles the employees of one of the businesses with those of another of the businesses, the Board may, upon the application of any person, trade union or council of trade unions concerned,

- (a) declare that the person to whom the business was sold is no longer bound by the collective agreement referred to in subsection 2;
- (b) determine whether the employees concerned constitute one or more appropriate bargaining units;
- (c) declare which trade union, trade unions or council of trade unions, if any, shall be the bargaining agent or agents for the employees in such unit or units; and
- (d) amend, to such extent as the Board considers necessary, any certificate issued to any trade union or council of trade unions or any bargaining unit defined in any collective agreement.

55(8) Before disposing of any application under this section, the Board ... may hold such representation votes, as it considers appropriate.

4. On January 1, 1979 Longyear Canada Inc. amalgamated two corporate entities, Canada Longyear Limited and Longyear Diamond Products. The parties agree that this transaction constituted a sale within the meaning of section 55 of the Act.

5. The parties further agree that prior to the amalgamation the two corporate entities carried on their affairs separately although they occupied the same building and were wholly owned by the same corporation. Canada Longyear Limited was engaged in the busi-

ness of manufacturing drills. The Machinists, Local Lodge 2412 has held the bargaining rights for the former Canada Longyear Limited production and maintenance employees since 1976. The bargaining unit consists of approximately 84 employees. On the other side of the building, Longyear Diamond Products carried on two distinct functions. It both manufactured the bits or cutting portions of the drills and inserted diamonds into the bits. The intervener union, the United Steelworkers of America, has held bargaining rights for the employees in both the manufacturing and diamond shops of the former Longyear Diamond Products since 1976. The bargaining unit encompassing both departments contains approximately 49 employees. The evidence establishes that prior to January 1, 1979, the date of the section 55 sale, there was virtually no interchange of employees either between the two departments of Longyear Diamond Products or between the two corporate entities of Canada Longyear Limited and Longyear Diamond Products.

6. Section 55(6) of the Act operates in those circumstances where an intermingling of employees takes place after the sale of a business. Both the applicant and respondent contend, while the intervener denies, that an intermingling of employees has taken place in this instance to trigger the application of section 55(6) of the Act. Approximately one month before the amalgamation the company circulated the following letter among the employees in both bargaining units:

“November 23, 1978

TO ALL EMPLOYEES:

In order to consolidate the activities of the Longyear Company in Canada, an amalgamation of Longyear Diamond Products and Canadian Longyear Limited will become effective January 1, 1979, when a new company “LON-
GYEAR CANADA INC.” will be formed.

What will it mean to you? From a working point of view, the majority of Employees will not be affected. Those in Bargaining Units will retain their seniority and status. Some changes and re-alignment of duties may result for those Employees on the Administrative Staff, who have a direct involvement with diamond products activities. Precise details will be communicated to those concerned, in their near future. In terms of working conditions, some integration of Benefit Programmes will take place. Again, this will affect mainly Administrative personnel and details will be communicated as soon as they are known. No reduction in work force is anticipated as a result of the amalgamation.

We sincerely believe the new structure will bring with it new opportunities for the betterment of the Longyear Company and its Employees, in the future.

Sincerely yours

V. L. Merriman
Vice-President and
Managing-director.”

Counsel for the intervener union asserts that because the letter does not indicate that bargaining unit employees would be intermingled the Board should assume that the company did not and does not intend to intermingle its bargaining unit employees.

7. Having regard to the totality of the evidence, however, the Board accepts the testimony of Mr. Kevin Vaughan, the financial consultant of Longyear Canada Inc., that the November 23rd letter was not intended to be an exhaustive expression of the company's plans but only a reassurance to employees that the amalgamation would not cause lay-offs or a loss of seniority. The Board further accepts Mr. Vaughan's testimony that the company had always intended, following amalgamation, to integrate the two corporate entities wherever possible. The evidence establishes that among non-bargaining unit individuals the management staff, office, clerical and technical staff have already been fully integrated and that among bargaining unit employees the shippers have been integrated. The Board accepts that Mr. Vaughan stopped a further integration of the bargaining unit employees (the machinists and manufacturers) only because of a letter it received from the intervener on February 1, 1979 indicating that it viewed any integration of bargaining unit employees as a violation of the collective agreement in effect between the company and intervener.

8. Counsel for the intervener further argues that it would be a misuse of the Board's discretion under section 55 of the Act to declare that one bargaining unit should replace the two existing ones because in his view it would simply allow the employer to reorganize its labour relations into what it considers to be a more convenient structure when there is in fact no jurisdictional problem over which employees should perform the available work.

9. In support of its position counsel for the intervener referred the Board to its decision in *City of Peterborough* (File No. 1591-78-R, dated February 12, 1979, as yet unreported) where the Board declined to establish one bargaining unit notwithstanding the fact that a sale had taken place which grouped two sets of employees each represented by a different union under one employer. The *City of Peterborough* case is readily distinguishable from the matter before this Board. In that case the predecessor employer, Border Transport Ltd., had operated the public transit system in Peterborough on a franchise basis for over thirty years. It had employed 38 drivers, 4 mechanics and 4 cleaners. At the time the City purchased Border Transport Ltd. it already had in its employ persons in each of these classifications. Following the sale, however, the City declined to merge the new group of employees from Border Transit Ltd. with its own employees. Instead it left them to operate as two separate groups as they had done before the sale. Because the two groups of employees continued to work at separate locations with separate equipment and at separate jobs, the board was of the opinion that no intermingling had taken place and that the two groups of employees had separate communities of interest. In those circumstances, and because it was satisfied that the continuation of two separate bargaining groups would not unduly hamper the employer's operation, the Board declined to establish one bargaining unit and disturb a bargaining structure which had proved to be effective over time.

10. In the instant matter, unlike the situation in the *City of Peterborough* case, an intermingling of employees within the meaning of section 55(6) has already taken place. Furthermore, pending a decision from this Board, the employer intends to further integrate employees from the two bargaining units to eliminate a duplication of job functions which has resulted from the amalgamation of two previously separated groups. In the face of an intermingling of this nature, the Board readily accepts the employer's contention that the dual

bargaining network would greatly inhibit the effective operation of its amalgamated corporation. Accordingly, the Board is satisfied that this is an instance where it should re-align the bargaining structure in the manner requested by both the applicant and respondent.

11. The Board therefore declares pursuant to section 55(6) of the Act that the employees of Longyear Canada Inc. in North Bay formerly represented by the Machinists, Local Lodge 2412 and the United Steelworkers of America constitute one bargaining unit. Because of the substantial support enjoyed by each of the unions among the employees in question, the Board declines to declare that either the applicant or the intervener shall be the bargaining agent for the employees. Instead, pursuant to section 55(8), the Board orders that a representation vote be taken of all employees of Longyear Canada Inc. at North Bay save and except foremen, persons above the rank of foreman, charge hands, watchmen, field employees other than plant employees in the field, office, clerical and technical employees, sales staff and the cafeteria manager.

12. All employees of the respondent in the voting constituency on the 13th day of February, 1979, who have not voluntarily terminated their employment or who have not been discharged for cause between the 13th day of February, 1979, and the date the vote is taken will be eligible to vote.

13. Voters will be asked to indicate whether they wish to be represented by the applicant or the intervener in their employment relations with the respondent.

14. The matter is referred to the Registrar.

1168-77-M; 1275-77-M International Union of Operating Engineers and in particular Local 793, (Applicant), v. Pipe Line Contractors Association of Canada, and its affiliate **Majestic Wiley Contractors Limited**, (Respondent).

Section 112a – Whether collective agreement applies to certain work

BEFORE: Arthur Haladner, Vice-Chairman and Board Members C.G. Bourne and M.J. Fenwick

APPEARANCES: *A.M. Minsky, G. Davis and E. Ford for the applicant; R.C. Fillion, G.R. Hodson and R.M. Canfield for the respondent.*

DECISION OF THE BOARD; March 8, 1977

1. These are two referrals of grievances to the Board pursuant to section 112a of The Labour Relations Act.

2. The respondent employer is a member of The Pipe Line Contractors Association of Canada, an association accredited in Ontario as bargaining agent for employers employing members of The International Union of Operating Engineers, Local 793. The issue

raised by the grievances is whether the Pipe Line Agreement – between the Association and The International Union of Operating Engineers and its local unions having pipe line jurisdiction in Canada – which is effective from March 1, 1977 to April 3, 1979 – applies to and covers the work performed by members of local 793 at the repair shops operated by the employer at Cornwall in June and at Brockville in July to October of 1977. The Agreement was not applied to that work in contravention, the applicant says, of Article 2(B) which provides:

ARTICLE II – SCOPE OF WORK

B. All of the work covered by this Agreement shall be done under and in accordance with the terms and conditions of this Agreement ...

3. The local 793 members employed in the Cornwall and Brockville shops (as mechanics, welders and helpers) were engaged throughout the periods in question in the repair and overhaul of heavy construction equipment used by the employer in the construction and upgrading of a gas pipeline for Transcanada Pipelines Ltd. The construction work, which began in January of 1977, involved the installation of a thirty-two mile stretch of pipeline from Cornwall to the Quebec border. While the construction was in progress, the employer, as was its custom on past projects, maintained a shop in the vicinity of the project – three miles east of Cornwall – to repair equipment not repaired in the field. The employees who worked in that shop were paid in accordance with the terms of the Pipe Line Agreement and received the benefits provided thereunder. When the construction activities ceased – in March of 1977 the employees were laid off. In contrast to the lay-off which occurred at Brockville in October, this lay-off was made subject to recall. When the employees, some of whom left their tool boxes in the shop, were laid off they were not told that the Agreement would no longer be applied. They were told only that they would be recalled to do restoration work. In the past, the employer's practice – after a particular construction project has been completed – has been to keep on (or recall after a short break) its employees to restore the equipment so that it can be used on other projects or sold. In the past, such post-construction repair work has always been done pursuant to the Agreement.

4. The members of Local 793 recalled by the employer in June remained at Cornwall until the beginning of July when they were transferred, together with the equipment and the shop, a portable butler facility, to Brockville where they continued, along with members of local 793 hired locally, to repair and overhaul equipment used on the Cornwall to Quebec job. At Brockville, the employees also did some repair work of equipment used by the employer at Gravenhurst and Thunder Bay where the employer was engaged in some pipeline upgrading work – also for Transcanada. Apparently, a small amount of this equipment was sent back to Thunder Bay, where upgrading was still going on.

5. On October 21st the employees at Brockville were placed on indefinite lay-off; and as of the last date of hearing – December 18th – had not been recalled. There was, at the time of the lay-off, approximately 330 pieces of equipment at Brockville – 220 from the Cornwall/Quebec job. This equipment, most of which sold at auction last summer, was never worked on again; and the Board was informed that the employer has no plans to recall employees to repair the 56 pieces now remaining.

6. Robert Canfield, the employer's industrial relations supervisor, gave evidence

that the employer's board of directors decided – at its annual meeting in March of 1977 – that in view of the uncertain state of the pipeline industry, it was advisable to establish an operations base in eastern Canada – a base which Canfield later stated was intended to be permanent. (Canfield testified that in March of 1977 the company was nearing completion of its ongoing construction projects – in the vicinities of Cornwall, Gravenhurst and Thunder Bay – and that it had in hand no further contracts east of Alberta, although it was hopeful of obtaining work in eastern Canada – on the proposed Quebec and Maritimes project – as well as outside the country.) The employer's objective in establishing an operations base was, Canfield testified, to consolidate its equipment which at that time was scattered throughout the province and to avoid paying rent at more than one location particularly since it was anticipated that equipment might have to be sold. Canfield told the Board that the company made efforts to locate in the vicinity of Toronto, near Highway 401, the ideal location for an operations base – because of its proximity to the company's head office and because of the highway's wide load capacity – but that it ultimately located at Brockville on land owned by Permanent Concrete. Canfield told the Board that the employer has no lease at Brockville and that it is not paying rent. Permanent has requested only that it keep the land, for which it has no use, clean. Canfield stated, moreover, that the employer can reasonably expect to stay at Brockville for as long as it wishes. He stated that Permanent has been a sub-contractor for Majestic on a number of projects and that it can anticipate the employer's continued patronage.

7. As stated, the Brockville shop is located in the same portable facility used by the employer at Cornwall – after the shop was dismantled, trucked 60 miles south along Highway 401, and then reassembled. At Brockville, the shop was enlarged and placed on a concrete pad. Apart, however, from the installation of some additional hydro electricity, there were no other changes of a physical nature. The concrete, which was poured at a cost of approximately five-thousand dollars, was necessary owing to the unstable nature of the ground. It should be noted that the employer rented the premises at Cornwall and that it was forced to leave because the lessor, a trucking firm, required the lands. Canfield testified, however, that the decision to establish a shop at Brockville had nothing to do with its proximity to Cornwall.

8. Canfield gave evidence that the employees were recalled to Cornwall in June because Majestic was hopeful of obtaining contracts in eastern Ontario, as well as overseas, and that the men were laid off at Brockville – in October – after the company was advised that it had been unsuccessful on all its tenders. At that time, the company could see no possibility of work in the foreseeable future. The decision not to apply the Pipe Line Agreement at Cornwall after June and at Brockville was predicated, Canfield said, on the outlook for work. Canfield also stated that the Agreement was not applied to those shops because there was no ongoing construction in the area and because the shops “had nothing to do with a project.”

9. Canfield told the Board that at the present time the employer has no work or contracts in Canada; that the outlook for the future is bleak; and that it is not feasible to continue operations. He did not know whether, or when, the Brockville shop would reopen.

10. The evidence disclosed that there are repair shops in western Canada as well as in Ontario at which the operators – all members of The Pipe Line Contractors Association – have negotiated separate shop agreements with the Operating Engineers' locals concerned.

These shops, all of which have been in operation for a number of years, and some of which are not primarily or only pipeline contractors, have provided continuous and relatively permanent employment for a nucleus of mechanics, welders and helpers who are maintained on the employer's payroll permanently. They are not laid off because the employer has no pipeline construction job in progress.

11. The provisions of the Pipeline Agreement relevant to these matters are:

ARTICLE I COVERAGE AND DEFINITIONS

THIS AGREEMENT SHALL apply to and cover the construction, installation, treating, reconditioning, taking-up, rebeveling, re-laying, re-locating, double-jointing or testing of all pipelines or any segments thereof transporting gas, oil, vapours, liquids, slurries, solids or other transportable materials and underground and marine cables and all work incidental thereto coming within the jurisdiction of the Union, contracted for or performed by the Employer within Canada as such work is more fully described below and illustrated in the accompanying charts. By mutual agreement this contract may be extended to cover other territory.

C. EXCLUSIONS from the coverage of this Agreement shall be:

1. Such pipeline construction, installation, repair, maintenance, replacement or reconditioning as may be combined with or associated with or comprising an integral part of other work, more particularly and usually defined as Engineering or Building Construction or work covering pumping stations, tank farms, refineries, or plant to plant connecting lines within city limits. The Employer recognizes that such work is covered by other agreements as shown in the charts appended hereto and agrees to abide by same.

ARTICLE II SCOPE OF WORK

A. If and when the Employer, or any shareholder(s) holding a major equity or control therein, shall perform or shall cause to be performed any work covered by this Agreement under its own name or under the name of another as a person, corporation, company, partnership, enterprise, associate, combination or joint venture, this Agreement shall be applicable to all such work performed under the name of the Employer or the name of any other person, corporation, company, partnership, enterprise, associate, combination or joint venture.

B. All of the work covered by this Agreement shall be done under and in accordance with the terms and conditions of this Agreement, whether done by the Employer and/or any and all sub-contractors. The Employer will engage those sub-contractors who employ only

members of the Union, or who shall hire members of the Union for the performance of the subcontract. The Employer shall be responsible for enforcing the wages and conditions of this Agreement on the sub-contractor(s).

D. The work coming under the jurisdiction of the Union and covered by the terms of this Agreement includes all work performed by employees in the classifications referred to herein and other power-operated equipment coming within the jurisdiction of the Union.

F. In no event shall the Employer be required to pay higher rates of wages, or be subject to more unfavourable working rules than those established by the Union for any other Employer engaged in similar work.

G. This Agreement shall supersede all other Agreements between the parties or between the Employer and any Local Union for all work defined in Article I hereof.

12. Counsel for the union contends that the phrase "all work incidental thereto" in Article I clearly and unambiguously applies to the work performed in the Cornwall and Brockville shops inasmuch as that work consisted entirely of the repair and overhaul of equipment after it had been used by the employer in the construction and installation within Canada of a gas pipeline. There is, counsel says, judicial authority for the proposition that the words "incidental thereto" mean "consequent on." Counsel argues that, in any event, the phrase, which is one of ordinary usage, includes whatever follows thereafter as a natural consequence thereof. Counsel also points out that repair work done in a shop, whether during or post construction, is not one of the exclusions from coverage contained in Article I (C) and that Article II (D) includes all work performed by employees in the classifications coming within the jurisdiction of the union. It was not disputed that the work performed in the Cornwall and Brockville shops was done by employees in the classifications, namely, apprentice, intermediate and principal operators (which includes mechanics, welders and helpers) and that it came within the jurisdiction of Local 793.

13. Counsel for the employer, on the other hand, contends that the phrase "all work incidental thereto" is ambiguous in its requirements and does not apply to the post construction repair work performed by the employer at Cornwall and Brockville. Counsel points out that the work described in Article I is qualified by the phrase "as such work is more fully described below and illustrated in the accompanying charts ..." and that there is nothing in the Agreement or the charts about repair work done in a shop. Counsel does not contend, however, that the work covered is exhaustively described/illustrated in the Agreement and the charts. He conceded that there is work covered by the Agreement which is not explicitly described or illustrated. In particular, he conceded that the Agreement has application to repair work which is done in a shop in conjunction with an ongoing project, i.e., that the work done at Cornwall from January to March, 1977 was covered. Counsel takes the position that the work performed at Cornwall post construction is excluded from coverage because it was not done in conjunction with an ongoing construction project and that the work done at Brockville is excluded because, in addition to the foregoing, the employer had established at Brockville a permanent base for its yard and facilities in eastern Canada.

14. The evidence establishes that the work performed in the employer's shop post construction was no different from the work performed while the construction was in progress. The work, which was performed in the same portable facility, and with many of the same employees, consisted entirely of the repair and overhaul of equipment which had been used by the employer in the construction and installation of a gas pipeline in the vicinity of Cornwall and in the vicinities of Thunder Bay and Gravenhurst. The evidence establishes, moreover, that the employer's practice, and the practice of other employers bound by the Pipe Line Agreement, has been to apply the Agreement to post construction repair work performed in a shop. In the past, the practice has been for employers to keep their shops in operation for a period of weeks or months after the completion of a particular project and to maintain (or recall after a lay-off) its employees to repair the equipment.

15. Counsel for the employer argues that the situation at Cornwall in June and at Brockville in July can be distinguished on the ground that in the past, when employees were recalled, it was almost invariably the case that equipment would be moved on to a new project. In the Board's view, this is a distinction without a difference. The reason for the practice, which has spanned a number of collective agreements in addition to the present one, is to allow the employer to maintain its equipment in a constant state of readiness. The Board was informed that it is not unusual for a pipeline contractor to receive less than a week's notice of an upcoming job and that a contractor's success in tendering often depends upon its ability to have its equipment on the ready. The evidence in the instant case is that at the time the employees were recalled to Cornwall the employer was hopeful of obtaining contracts in eastern Ontario, as well as overseas, and that upon being advised that those contracts would not be forthcoming, it closed its shop, which was then at Brockville, and subsequently sold off the bulk of its equipment, most in an unrepaired state. We would point out as well that there was, at the time the Brockville shop was established, construction work going on in the vicinity of Thunder Bay and that equipment, albeit a small amount, was sent there.

16. Although Canfield gave evidence that the premises at Brockville were not chosen because of their proximity to Cornwall, and that they were intended to provide a permanent operations base, the evidence is not consistent with an intention to establish a permanent repair shop. On the contrary, the evidence suggests that the Brockville facility, which was neither near Toronto nor the 401, and which was established after the employer had been requested by the lessor at Cornwall to leave was, for all intents and purposes, an extension of the facility at Cornwall, the facility from which it sprung. By contrast with the "permanent repair shops" – the shops having separate shop agreements – the facility at Brockville has not provided for its employees continuous and permanent employment. As in the past, the employees were laid off after a short period of post construction repair work – in this case four-and-a-half months – without prospect of recall.

17. Counsel for the employer contends that a permanent repair shop does not become temporary merely because of a lay-off which is necessitated by a lack of work and that, but for the current state of the pipeline industry – which is unprecedented – the employees at Brockville would have been kept on. But that flies in the face of the employer's contention that its decision not to apply the Pipe Line Agreement at Brockville as well as at Cornwall was predicated on the outlook for work. In any event, the facts are that the Brockville shop was closed after only a few months and the employer has no plans to re-open it. This is in sharp contrast to the situation existing at the "permanent repair shops"

which have been operated continuously for many years and independently of the ebb and flow of construction activity.

18. The lack at Brockville of permanency of employment is underscored by the lack of permanency of physical facilities. The evidence is that except for the addition of a slab on grade, the shop at Brockville, which is typical of the post construction repair shops previously operated by the employer and other pipeline contractors, is no different physically from its predecessor at Cornwall. In contrast to the “permanent repair shops”, all of which are fully serviced permanent structures, the portable butler facility used by the employer at Brockville lacks toilets and running water as well as change rooms. The employer has, moreover, no legal entitlement to the premises. As stated, the Brockville shop is located on land which it is using gratuitously – as a business favour. That there exists an expectation of continued use cannot detract from the fact that the employer has not seen fit to secure from Permanent a binding commitment to remain. The employer’s failure in this regard adds no weight to its contention that the shop in Brockville was intended to be permanent.

19. Our conclusion from the evidence is that the Brockville shop, which is presently being used as a storage depot only – for equipment not yet sold and not currently in use – cannot be considered permanent in any sense of that word since it reflects neither permanency of employment nor of physical facilities. In the Board’s view, the situation at Brockville is worlds removed from the situation existing at the shops where separate shop agreements have been negotiated. Assuming, but without finding, that those shops are removed from the ambit of the Pipe Line Agreement, The Board finds that the practice of the parties there, in not applying the Pipe Line Agreement, is of no relevance to the question of contract interpretation before us.

20. Nor is the fact that the applicant made – after it was informed of the employer’s decision not to apply the Pipe Line Agreement at Cornwall in June, or at Brockville thereafter – an application for certification in respect of the employees at the Brockville shop. Ernie Ford, the labour relations manager for Local 793, gave evidence, which the Board accepts, that he intended at the certification hearing, which the applicant did not attend, to raise the question of the applicability of the Agreement – in order to determine whether an application for certification was in fact necessary. In any event, the respondent has not purported to have relied on this subsequent action of the applicant.

21. As indicated, Article I provides that the Agreement applies to, and covers, the construction, installation ... of all pipelines ... and *all work incidental thereto* ... The Board heard evidence that the italicized phrase, which was not contained in the collective agreements which preceded the current one, was inserted because of a concern about possible encroachment by other unions on the jurisdiction of the Operating Engineers and that the question of the applicability of the Agreement to repair shops was not raised during the period of negotiation. Be that as it may, the clause was inserted and must, in the absence of an ambiguity, be given effect. (See in this regard *Yardley of London (Canada) Ltd.*, [1977] 14 LAC (2nd) 24 (O’Shea.)

22. The Board finds that while the precise extent of the phrase “all work incidental thereto” may not be clear from a consideration of the language alone, the work done at the Cornwall and Brockville shops, which followed almost immediately the cessation of the employer’s construction activities at Cornwall, Thunder Bay and Gravenhurst, and which was

done in order that the equipment could be maintained in a state of readiness-so that it could be moved on to other projects or sold, cannot on any reasonable construction of Article I, be said not to be work "incidental to" the construction and installation of pipelines. Accordingly, the Board finds that the Pipe Line Agreement covers and applies to all work performed by Majestic Wiley at the Cornwall and Brockville shops in the period from June to October, 1977.

23. We would add that had the Agreement not included the phrase "all work incidental thereto" as was the situation in years past, it would not have affected our conclusion here. In that event, the Agreement would have been ambiguous in its requirements (assuming that Article II (D) is of limited application) and the Board would have been required – in order to properly construe and apply it – to have recourse to the practice of the parties at past shops. As stated, that practice supports the conclusion that the Agreement was intended to have application to post construction repair shops of the type operated by the employer at Brockville and Cornwall.

24. At the hearing it was agreed that the Board, at this stage, would deal only with the question of liability and would remain seized of the grievances in the event the parties were unable to agree upon the amount of damages owing to the applicant.

1882-78-M International Association of Heat and Frost Insulators and Asbestos Workers Local 95, (Applicant), v. The Master Insulators' Association of Ontario, Incorporated and Master Insulation Company Limited, (Respondents).

Practice & Procedure – Whether Board will state a case for contempt where witness refuses to be sworn

BEFORE: R.O. MacDowell, Vice-Chairman and Board Members H.J.F. Ade and C.A. Ballentine

APPEARANCES: *S.B.D. Wahl, B. Fishbein and J. Duffy for the applicant; W. G. Posthumus, Joe Bittenbinder and Greg Farrar for the respondents.*

DECISION OF THE BOARD; March 7, 1979

1. This is an application under section 112a of The Labour Relations Act which provides as follows:

112a.-(1) Notwithstanding the grievance and arbitration provisions in a collective agreement or deemed to be included in a collective agreement under section 37, a party to a collective agreement between an employer or employers' organization and a trade union or council of trade unions may refer a grievance concerning the interpretation, application, administration or alleged violation of the agreement, including

any question as to whether a matter is arbitrable, to the Board for final and binding determination.

(2) *A referral under subsection 1 may be made in writing in the prescribed form by a party at any time after delivery of the written grievance to the other party, and the Board shall appoint a date for and hold a hearing within fourteen days after receipt of the referral and may appoint a labour relations officer to confer with the parties and endeavour to effect a settlement before the hearing.*

(3) Upon a referral under subsection 1, the Board has exclusive jurisdiction to hear and determine the difference or allegation raised in the grievance referred to it, including any question as to whether the matter is arbitrable, and the provisions of subsections 5a, 7. 8. 9. 10 and 11 of section 37 apply *mutatis mutandis* to the Board and to the enforcement of the decision of the Board.

(4) The expense of proceedings under this section, in the amount fixed by the regulations, shall be jointly paid by the parties to the Board for payment into the Consolidated Revenue Fund.

(Emphasis added)

2. The application currently before the Board alleges, *inter alia*, that the respondent Master Insulation Company Limited (hereinafter referred to as "the employer") has over an extended period of time failed to hire trade union members or pay the wages and benefits required by a collective agreement by which it is bound. It is further alleged that this breach of the collective agreement is continuing in respect of certain projects now under construction, including the "project at Lever Brothers, Broadview Avenue, and Front Street" in the City of Toronto. The applicant seeks damages for past breaches of the collective agreement, and various remedial orders designed to ensure present and future compliance.

3. In this case the written grievance consisted of a letter from the solicitors for the trade union setting out the substance of the complaint, and warning that it would be referred to arbitration pursuant to section 112a unless the problem was "forthwith rectified." This letter, dated February 12, 1978, was delivered to the employer on or about February 14, 1978. Counsel for the respondent employer acknowledges that this letter was received by his client and immediately brought to his attention. He wrote to the solicitors for the union advising them that he was making arrangements to discuss the matter with his client, and thereafter he would communicate further. This letter is dated February 21, 1979 and was received by the solicitors for the respondent on February 23, 1979, but was apparently dictated on February 15th, 1979. It is disputed that by that date both the respondent and its counsel were aware of the nature of the union's claim, and that if it was not resolved "forthwith", there would be an immediate referral to the Labour Relations Board.

4. At the end of the business day on February 15, 1979, the solicitors for the applicant union filed with the Board a section 112a reference, to which was attached a copy of their February 12th letter to the employer, and what purports to be a collective agreement between the parties. This application was processed in accordance with the Board's usual

procedure, and by a decision dated February 20, 1979 a labour relations officer was appointed to confer with the parties and endeavour to effect a settlement. A hearing date was fixed for March 2, 1979 and notice of hearing sent. Counsel for the parties advised the Board that their clients had both received this formal notice of hearing on February 23rd. The parties met with a labour relations officer on February 27, 1979, but as there was no amicable resolution of the dispute, the matter came on for hearing before the Board on March 2, 1979.

5. At the opening of the hearing, the Board, on its own motion, requested the submissions of counsel on the appropriate manner of proceeding, in view of the broad scope of the allegations contained in the union's application. These allegations involved a number of discrete violations of the agreement extending over some considerable period of time. The Board suggested that it might be appropriate to proceed initially to hear evidence only in respect of the project specifically mentioned in the pleadings, since it appeared that this project was currently ongoing, and the respondent had had specific notice and therefore a full opportunity to consider the union's grievance in respect of this named location. Counsel for the union advised that he was prepared to proceed on that basis, but counsel for the employer was not.

6. Counsel for the employer submitted that, although he had knowledge of the union's complaint on or about February 14th, he had not been able to meet with his client until the day before the hearing, and consequently had not been able to fully consider the matter and take appropriate instructions. He also pointed out that he had a number of appointments with clients that he was unable to reschedule and that if the Board decided to proceed he would be forced to withdraw from the proceedings. He submitted that the Board should adjourn so that he would have the opportunity to take further instructions and fulfill his other commitments. Counsel for the applicant opposed an adjournment in these circumstances, arguing that the respondent had been properly served with the written grievance, the referral, and the notice of hearing (which facts were admitted) and that the respondent knew, or ought to have known, that a hearing would shortly take place if the dispute was not settled. Counsel submitted that it would frustrate the special Legislative scheme for the speedy resolution of disputes if a party were granted an adjournment simply because it was not prepared to proceed to a hearing within the 14-day time limit required by the statute.

7. After considering the representations of the parties the Board ruled that it would proceed first to hear the evidence in respect of the location set out on the face of the pleadings. The Board was satisfied that the respondent had sufficient notice in respect of this project and would not be prejudiced if the union began its case by tendering evidence in respect thereto. In reaching this conclusion the Board was concerned with the importance of expedition in resolving section 112a referrals, and the real probability that delay in this matter might cause serious prejudice to the applicant. As the Court of Appeal noted in *Re: The Journal Publishing Company of Ottawa Ltd. and the Ottawa Newspaper Guild Local 205 et al.*, (per Estey C.J.O., oral judgment released May 19, 1977 – unreported) the law which has grown up around labour relations has consistently recognized that "labour relations delayed, are labour relations defeated and denied." This concern for expedition is especially important in the construction industry where the tradesmen are employed on a job site for only a limited period of time and thereafter move on to other projects and employers. Disputes concerning their terms and conditions of employment or the applicability of a collective agreement must be resolved without delay. The Board was not satisfied that counsel's

previous commitments were a sufficient ground to grant an adjournment. In our view the applicant should not be prejudiced because the respondent, when advised of a hearing, chooses to retain counsel who by reason of previous commitments is not in a position to proceed on the day fixed for that hearing.

8. Immediately following the Board's decision that it was prepared to proceed, counsel for the employer requested an adjournment so that he could seek judicial review of this ruling. The Board determined that, in the particular circumstances of this case, it was just and convenient to proceed, notwithstanding the possibility of a challenge to its jurisdiction (see *Re Cedarvale Tree Services and Labourers International Union of North America Local 183*, [1971] 3 O.R. 832 [C.A.])

9. In order to prove that the respondent had not applied the collective agreement on the various projects in which it had been engaged the applicant had served one Joe Bittenbinder, an officer or agent of the respondent, with a *subpoena duces tecum* requiring him to give oral evidence and in addition to produce certain employment and business records concerning the company's construction activities. This subpoena was very broadly drafted and counsel for the employer took exception to it. It was admitted, however, that the witness had been properly served and had been paid the appropriate amount of conduct money.

10. The subpoena to which counsel objected is in proper form, was signed by a Vice-Chairman of the Board, and was properly issued pursuant to section 92(2) of The Labour Relations Act, and section 12 of the Statutory Powers Procedure Act; however, attached to it is a "Schedule A" which contains a comprehensive and detailed list of the documents said by the applicant to be relevant. The Board agreed with counsel for the respondent employer that it would be unreasonable and oppressive to require the witness to produce, at the outset, all of the documents which might fall within that description, whether or not they were relevant to the immediate enquiry. The Board was not prepared to countenance a "fishing expedition", but having already limited the scope of our initial enquiry, the Board was satisfied that it could nevertheless begin hearing the evidence. The Board advised counsel for the respondent that it recognized his concern about the scope of the subpoena, and that if at any point he wished to object to the production of particular documents on the grounds of relevance or otherwise the Board would entertain his submissions at that time. Counsel took the position that because it might be unreasonable to produce, at this time, *some* of the documents set out in the subpoena, his client was relieved of giving *any evidence whatsoever*. Counsel did not contend that the evidence sought was protected by any privilege, however, he advised the Board that in his opinion his client was under no obligation to tender any oral or documentary evidence, and he advised his client (who was in attendance) to refuse to be sworn. On the advice of counsel, the witness Bittenbinder declined to be sworn when directed by the Board to take the stand.

11. Counsel for the applicant contended that, since the witness had been properly subpoenaed, he was obligated to give evidence and that this evidence was vital to the applicant's case. Counsel contended that only the respondent was fully aware of its own business activities and that the applicant was entitled to examine the witness in respect thereto. Counsel requested that the Board apply, pursuant to section 13 of the Statutory Powers Procedure Act, to the Divisional Court for an Order punishing the recalcitrant witness for what he characterized as "contempt." The Board is entitled of its own motion to make such appli-

cation to the court but, in the circumstances of this case, declines to do so. In our view it would be inconsistent with the quasi-judicial function we are required to perform if the Board were to actively seek the committal of a party to a proceeding before it. While the respondent's course of conduct does seem calculated to delay or frustrate the proceedings, the Board is not persuaded that it should enter the arena as a litigant opposed in interest to a party involved in proceedings before it – especially when the applicant is able to do so. It was the applicant who chose to subpoena this particular witness, and the Board is of the view that the process would be better served if the applicant took the responsibility for enforcing its own subpoena. However, the Board recognizes that if this matter cannot be expeditiously resolved in the courts, the whole purpose of the summary proceeding under section 112a could be undermined. The Board is seriously concerned that its proceeding has been short-circuited by the witness's refusal to give relevant evidence. Accordingly, the Board advised both counsel that it would reduce its procedural rulings to writing and would issue its decision as quickly as possible so that both parties would be in a position to seek a resolution of this problem in the Divisional Court. The Board also undertook to file the record of its proceedings in the Court in accordance with its usual practice on motions by way of judicial review.

12. The final matter outstanding is that of costs. The applicant seeks the costs of the day "in any event of the cause." It is unclear whether the Board has the statutory authority to award costs, but in any event the Board is unanimously of the view that in the circumstances of this case, and at this stage of the proceedings, the Board should not impose costs. While it is true that the applicant may incur considerable expense in proceeding in the Divisional Court, that is a matter which can be raised in that forum.

13. Since it was apparent that the Board would be unable to proceed further, the Board decided to adjourn. The Board advised counsel of five available days in March and April when it would be able to reconvene and hear evidence either in respect of matters for which Mr. Bittenbinder's testimony is not required or, alternatively, to entertain his evidence if the issues in respect thereto have been resolved. The parties are directed to advise the Registrar of their intentions.

1788-78-R International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (U.A.W.), (Applicant), v. **NETP Limited**, (Respondent).

Buildup – Certification – Board declining to apply buildup principle

BEFORE: R. A. Furness, Vice-Chairman, and Board Members H. J. F. Ade and C. Ballentine.

APPEARANCES: *H. Carl Anderson and Bruce K. Lee for the applicant; Jacques A. Emond and Lorenz Hauf for the respondent.*

DECISION OF THE BOARD; March 6, 1979

1. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.
2. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent in Niagara Falls, save and except foremen, persons above the rank of foreman, office and sales staff, constitute a unit of employees of the respondent appropriate for collective bargaining.
3. This application for certification was filed on January 31, 1979. At the hearing the Board announced that there were Thirty-four employees on the list for the purpose of the count and that the applicant had filed evidence of membership of the type referred to during the hearing on behalf of thirty-two of these employees.
4. The respondent requested the Board to defer consideration of this application until a later date because of a planned build-up in the work force. This request was opposed by the applicant.
5. Lorenz Hauf, the vice-president and a part owner of the respondent, testified before the Board. It was established that the respondent commenced operations in July of 1978. The initials in the respondent's name represent "Niagara Electrical Technical Products". The respondent is engaged in the manufacture of automotive wiring, harnessing and automotive interior plastic parts. In July of 1978 the respondent hired one machine operator. This person has worked in the respondent's office since October. In August of 1978 the respondent hired a labourer. In September of 1978 the respondent hired a total of thirteen persons (twelve labourers and one lead hand). In December of 1978 the respondent hired ten persons (eight labourers, one lead hand and one quality controller). In January of 1979 the respondent hired nine persons (eight labourers and one quality controller). Persons who are hired by the respondent undergo a training period of three months under a manpower planning programme. The respondent is in the process of expanding its operations and has entered into contracts for additional production in the future. In July the respondent expects to have fifty employees and in October of this year the respondent estimates that it will have eighty employees. These projected figures are based upon work derived from contracts which have been awarded to the respondent. At the end of the training period employees who have not qualified to perform the respondent's work will be released.
6. Between January 31, 1979 and the date of the hearing, February 19, 1979, the respondent has not hired any new employees. While Mr. Hauf stated that new classifications would be created for future employees, it is clear that the employees who will be hired in the future are no different from the labourers who are presently employed by the respondent. The respondent trains labourers to perform certain functions during a training period of three months. It appears to be a question of the emphasis during training rather than any basic differentiation of skills. At the present time the respondent has not defined any classifications with respect to its employees.
7. In the *Emil Frant and Peter Waselovich of C.N.R. Fort Frances, Port Arthur* line case, 57 CLLC ¶18,057, the Board stated that in an application for certification which involves the question of build-up it is necessary to balance the right, on the one hand, of persons presently employed to collective bargaining and the right, on the other hand, of future employees to select a bargaining agent of their own choice. The Board also stated that in or-

der to justify a refusal to certify a trade union immediately and to direct a representation vote at some date in the future, it must be established that there is a real likelihood that the increase in the work force will take place within a reasonable period of time. If it appears that the build-up depends on factors beyond the control of the employer then the Board, instead of directing a representation vote in the future, may certify a trade union or order an immediate representation vote depending on the membership position of the applicant.

8. In the instant application the Board is satisfied that the planned build-up will occur. At the time of the hearing the applicant represented more than ninety-four per cent of the employees in the bargaining unit. In addition, with evidence of membership with respect to thirty-two persons the applicant would be entitled to certification for a bargaining unit of fifty-eight employees. It appears that this level of employees may not be reached until August of this year. The Board is not persuaded that the job functions presently utilized by the respondent are basically any different from the job functions which the respondent will utilize by October of 1979.

9. On the date of the making of this application the employees in the bargaining unit constituted a substantial and representative proportion of the work force to be employed by the respondent. See the *Whitaker Cable of Canada Limited*, case [1968] OLRB Rep. January 990; and the *Davidson Rubber Company Incorporated* case, [1967] OLRB Rep. June 258. On the basis of its present membership position the applicant would be entitled to certification even if substantially more than half of the projected total of employees were presently employed by the respondent. In these circumstances the Board finds no reason either to postpone consideration of this application or to direct a representation vote.

10. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on February 8, 1979, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

11. A certificate will issue to the applicant.

1772-78-R International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.), (Applicant), v. **The Ontario Hospital Association**, (Respondent).

Certification – Membership Evidence – Representation vote – Alleged irregularities in membership evidence – Union withdrawing application following its own investigation – Parent union later submitting new application – No irregularities in fresh evidence – Certification granted without vote

BEFORE: R. A. Furness, Vice-Chairman, and Board Members H. J. F. Ade and C. Ballentine.

APPEARANCES: *Barrie Chercover, Carl Anderson and Clare Meneghini for the applicant; F. G. Hamilton, E. T. Mustard and Joy Sutherland for the respondent.*

DECISION OF THE BOARD; March 14, 1979

1. The name: "Ontario Hospital Association (Ontario Blue Cross)" appearing in the style of cause of this application as the name of the respondent is amended to read: "The Ontario Hospital Association".
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.
3. It became apparent during the hearing that the applicant was entitled to certification pending the final resolution of the bargaining unit pursuant to section 6(1a) of The Labour Relations Act.
4. The respondent requested that, notwithstanding the evidence of membership filed by the applicant and the count based upon such evidence of membership, a representation vote be directed by the Board. The applicant opposed this request.
5. In support of its request the respondent relied on the conduct of the applicant in an earlier case (see *The Ontario Hospital Association* case, Board File No. 0718-78-R, as yet unreported) and decisions of this Board in the *Hydro Electric Commission of Hamilton* case, 58 CLLC ¶18,120, and in the *Echlin United of Canada Limited* case, [1965] OLRB Rep. May 91.
6. Various letters from File No. 0718-78-R were introduced before this panel of the Board and various facts were referred to from File No. 0718-78-R. No objection was made to the introduction of such evidence. On this basis the Board considered evidence from File No. 0718-78-R.
7. In its reply in File No. 0718-78-R, the respondent made certain allegations of improper conduct on the part of the applicant with respect to the membership evidence and the method in which it was obtained. In a letter dated August 18, 1978, the applicant's counsel stated: "In the circumstances of certain matters which have just come to the attention of the U.A.W. officials, our clients, the applicant, request leave of the Board to the withdrawal of this application." In a letter dated August 24, 1978, counsel for the respondent stated:

“We have received a copy of the Union’s letter to the Board requesting leave to withdraw its application for certification. On behalf of our client, we wish to oppose such a request. It is our submission that in view of the alleged irregularities in the evidence of membership about which we have advised the Board and because of the seriousness of the charges concerning intimidation and coercion by the Union, that the application should be dismissed with the normal six month bar. In this way, none of the membership evidence presently before the Board may be utilized in any subsequent application. We submit that a bar is the only appropriate way in which the Board and the O.H.A. may secure any assurance that all the employees have had a fair opportunity to consider union membership.

More particularly, it is submitted that a bar is appropriate in the special circumstances of this case. At the last meeting with the examiner, we were advised by the examiner that the Union were in a position of automatic certification any way that the bargaining unit was described. Consequently, the effect of the Union’s subsequent request for withdrawal is not a request for the withdrawal of an application for certification but a request for withdrawal from a situation of automatic certification. On this basis, the conduct of the Union enhances the legitimacy of our allegations. Moreover, we are confused by the vagueness of the letter requesting withdrawal in view of the fact that all the allegations made by us have been in the hands of the Union for several weeks. We may only conclude that all the circumstances of this case militate towards imposing a bar.

In view of these submissions, if the Board is disposed to consider the request of the Union, we would ask for a hearing on the matter in order to present our position to the Board orally.”

8. In a letter dated September 8, 1978, counsel for the applicant stated, in part:

“In para. 2 of the Company’s reply, it is alleged that ‘irregularities may have occurred in the collection of monies associated with the solicitation of membership, in that persons signing receipts as the actual collector of monies have not, in fact, done so’. Following the receipt of this reply, a thorough investigation was conducted by U.A.W. officials to ascertain whether, in fact, there were any such procedural shortcomings or technical errors made by in-plant employee organizers which may not have come to the attention of the Union officials.

As a result of the U.A.W. investigation, it was discovered that a number of in-plant employee organizers had, through inadvertence or a misunderstanding of the Board’s requirements as explained to them, signed cards as ‘collectors’ of the \$1.00 when, in fact, one of their fellow employees had physically received the \$1.00 from the applicant for membership. When they had been asked by the Union officials who signed Form 8 whether they had received the \$1.00 in each case they

had assured him that they had, on the misunderstanding and belief that it was sufficient that the \$1.00 came from the applicant for membership. It did not occur to them that the term 'collector' meant the person who had, in fact, physically received the \$1.00 from the applicant for membership. The Union's investigation disclosed that while this happened in a number of instances, there was no evidence that any applicant for membership had not, in fact, paid their \$1.00. However, in view of the number of cards retained by several persons who had mistakenly signed as collector, and the uncertainty that there might not be others of the same nature which could not be ascertained or identified, the U.A.W. felt it had no alternative, in the face of these irregular technicalities, but to ask the Board's leave to the withdrawal of the application."

In a decision dated October 2, 1978, a majority of the panel in File No. 0718-78-R stated, in part:

"7. The respondent's letter was forwarded to the applicant and on September 8th the applicant replied to the respondent's letter in which it set out its position with respect to the issues raised by the respondent, and in which it disclosed that it had, on its own investigation, discovered irregular technicalities had occurred with respect to implant collection of fees. This letter was, in turn, forwarded to the respondent.

8. The Board has considered the written representations of the parties and has reviewed the jurisprudence and practice of the Board relevant to the issues raised. It has been the long-standing procedure of the Board in circumstances such as exist here to dismiss the application without the imposition of a bar. As the cases indicate, a dismissal does not preclude the employer or any other party of proper interest from raising relevant allegations of improprieties should any future application be made by the applicant and for invoking a dismissal if the allegations are established.

9. On the basis of the circumstances of the present case and having regard to the principles set out in *Hi Way Market Limited*, [1967] OLRB Rep. Dec. 835; *Fruehauf Trailer Company of Canada Limited*, [1974] OLRB Rep. Jan. 6; *Watson Manufacturing Company of Paris Limited*, [1968] OLRB Rep. Aug. 441; *Sherman Sand and Gravel Limited*, [1976] OLRB Rep. Oct. 610; and *Patchogue Plymouth Hawkesbury Mills*, [1972] OLRB Rep. July 747, the Board dismisses the application for certification, denies the request of the respondent and declines to exercise its discretion to impose a bar to a fresh application."

9. The respondent argued that the Board relies upon Form 8, Declaration Concerning Membership Documents, and the evidence of membership filed by the applicant. The respondent stressed that Form 8 is to be completed on the basis of knowledge (including inquiries), information and belief and argued that Form 8 had been signed negligently and erroneously. On this basis the Form 8 filed in File No. 0718-78-R was characterized as inaccurate.

rate, false and misleading. In these circumstances, the respondent argued that there is a cloud on the evidence in the instant application (even if new evidence of membership has been filed) which may only be dissipated by a representation vote in the instant application.

10. The central question to be considered by the Board is whether the conduct of the applicant with respect to evidence of membership in one application may cause the Board to seek the confirmatory evidence of a representation vote in a subsequent application for certification which involves the same employer, the same trade union and, to all intents and purposes, the same bargaining unit.

11. The application for certification in File No. 0178-78-R was filed on July 17, 1978, and was dismissed on October 2, 1978. Approximately four months later on January 29, 1979, the instant application was filed.

12. The interval between two applications for certification in the *Hydro Electric Commission of Hamilton* case, *supra*, was three months. The first application was filed by a local of an international trade union. Allegations of non-pay were made by the employer and the Board conducted its usual inquiries. The application was listed for hearing and during the course of the hearing the local trade union requested leave to withdraw its application. The Board denied this request and in accordance with its usual practice dismissed the application. The second application was filed by the international trade union and new applications for membership and receipts were filed. The employer submitted that the Board ought to bar the second application in that only slightly over three months had elapsed since the first application had been dismissed. The Board declined to impose a bar to the application. However, the Board did hold that despite the difference in the identity of the applicants and despite the fresh evidence of membership in view of the circumstances of the request for withdrawal in the first application there was a cloud on the evidence of membership which could only be removed by a representation vote.

13. The *Hydro Electric Commission of Hamilton* case, *supra*, in our view, is distinguishable from the instant application in that the former case involved some evidence of fraud being practised on the Board. Instances of non sign and non-pay with respect to evidence of membership have always been regarded by the Board as a fraud practised against the Board. Such instances of fraud have always been regarded by the Board as more serious than other conduct with respect to evidence of membership. Clearly in the *Hydro Electric Commission of Hamilton* case, the Board, as a result of the fraud which had apparently been practised on it, determined that a cloud remained on fresh evidence of membership which was submitted by an international trade union rather than one of its local trade unions. In the instant application the Board is asked to consider the effect of allegations with respect to evidence of membership which had been filed in a previous application. The admissions by the applicant in the previous application do not amount to fraud.

14. In the *Echlin United of Canada Limited* case, *supra*, an application for certification was withdrawn in the face of an indication of deficiencies in the completion of the Declaration Concerning Membership Documents. The Board dismissed the application. Shortly after the dismissal of that application the same trade union filed a second application with respect to the same employees of the same employer. In the second application the trade union filed evidence of membership which was in the form of re-signed application for membership cards in blank. These new cards did not indicate any payment of money. The

original membership cards were the only membership documents which indicated a payment of money. The Board concluded that the trade union's representative deliberately intended to mislead the Board. In ordering a representation vote because of a cloud on the evidence of membership the Board stated that but for the confused state of the evidence of membership caused by the testimony of the trade union's representative it might well have arrived at a different result. It is the view of this panel of the Board that this different result would have been certification without the confirmatory evidence of a representation vote.

15. The Board is not persuaded that the two authorities relied on by the respondent are applicable in the instant application. There is no evidence of any intention to mislead the Board. The admissions of the applicant in counsel's letter dated September 8, 1978, relate to irregularities caused by persons who are not representatives of the applicant. There is nothing in the material before the Board which indicates fraud on the Board. In our view, there is nothing in the nature of a cloud on the fresh evidence of membership filed in the instant application. No allegations of improper or irregular conduct have been filed with respect to the fresh evidence of membership and the Board does not find it necessary to seek the confirmatory evidence of a representation vote.

16. The applicant and the respondent are apart with respect to the bargaining unit on the inclusion or exclusion of persons in the mailroom staff.

17. The Board is satisfied that the ultimate determination with respect to the status of the persons in dispute does not affect the applicant's entitlement to certification. The Board is satisfied that regardless of its determination with respect to the persons in dispute more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on February 13, 1979, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act. Accordingly, the Board certifies the applicant under the provisions of section 6(1a) of the Act as the bargaining agent for all office and clerical employees of the respondent within the Municipality of Metropolitan Toronto, save and except section heads, managers or co-ordinators, persons above the rank of section head, manager and co-ordinator, audio-visual staff, sales staff, communications staff, print shop staff, internal auditors, consultants, all employees in the Hospital Employee Relations Services Department (including personnel and payroll staff), all employees of the Investment Services Department, all employees of the Hospital Accident Prevention Department, Systems analysts, programmers and all computer operations staff, maintenance engineers, mailroom staff, pharmaceutical chemists, students employed during the school vacation periods and persons regularly employed for not more than twenty-four hours or less per week pending the final resolution of the composition of the bargaining unit. For the purpose of clarity the Board declares that store room clerk, porter and parking lot attendant are included in the bargaining unit and that the external auditor is excluded from the bargaining unit.

18. Mr. N. Wilson, Labour Relations Officer, is authorized to inquire into and report to the Board on the duties and responsibilities of the mailroom staff.

0475-78-R United Steelworkers of America, (Applicant), v. **Radio Shack**, (Respondent), v. Group of Employees, (Objectors).

Certification – Section 7a – Employer engaged in concerted antiunion campaign including illegal discharges and failure to comply with Board reinstatement order – Section 7a certificate issued – Board relying upon findings but not evidence in previous unfair practice proceeding

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members W. Gibson and B. Lee.

APPEARANCES: *Martin Levinson, James Hayes and Gaye Lamb for the applicant; Donald J. McKillop, Q.C. and R. Murden for the respondent; no one appeared for the objectors.*

DECISION OF THE KEVIN M. BURKETT, VICE-CHAIRMAN AND BOARD MEMBER B. LEE; March 29, 1979

1. This is an application for certification relating to a bargaining unit of part-time employees of the respondent. The applicant has requested that the Board apply section 7a of the Act and certify it as bargaining agent for the part-time unit without a vote.
2. At the outset of these proceedings, counsel for the applicant raised a number of procedural and evidentiary issues which he argued should be resolved by a clear direction to the parties. In particular, counsel requested a direction from the Board on the extent to which the Board, in disposing of the applicant's request that it apply section 7a of the Act, was prepared to admit into evidence and rely upon findings of law and fact, and the evidence adduced in support thereof, made by a differently constituted panel of this Board in a number of prior section 79 proceedings between the same parties to this application.
3. In order to clarify the issues raised by counsel's request for a direction, it is necessary to set out in some detail a history of the proceedings before the Board between the parties to this application.
4. On May 8, 1978, the applicant filed a complaint with the Board under section 79 of the Act alleging that John Oosterdag, Sherry Hoyer, William Vernon, Henry North, Jr. and Stephen Gradon, employees of the respondent in the respondent's Barrie operation, had been dealt with contrary to sections 56, 58 and 61 of the Act. Specifically, the applicant alleged that these five employees of the respondent had been discharged or laid off by the respondent for reasons pertaining to the applicant's organizing campaign then underway at the respondent's Barrie operation. In an oral decision dated September 27, 1978, a differently constituted panel of the Board than the one seized with this matter found that the respondent had acted contrary to section 58(a) of the Act in its dealings with North and Gradon and ordered that the respondent reinstate them to their former jobs with compensation for lost wages. The complaints of the three other grievors were dismissed. In its written decision dated October 12, 1978 (Board File No. 0274-78-U unreported) the Board, after reviewing the evidence, found on the balance of probabilities that the respondent had not discharged the onus of demonstrating that the discharges were solely for unsatisfactory work or business reasons and unmotivated by the employees' union activity (see paras. 20 and 46).
5. The applicant by letter dated October 31, 1978 alleged that the respondent had

failed to comply with the Board's order of September 27, 1978. At the hearing into the allegations of non-compliance, the applicant withdrew, without prejudice, its allegation with respect to the employment status of North. By a decision dated December 4, 1978, the same panel of the Board which had rendered the decisions of September 27 and October 12, 1978 found that the respondent had failed to comply with the Board's order of September 27, 1978. The Board in finding that the respondent had failed to comply with its October 12, 1978 order stated at paragraphs 19 and 20 of its December 4, 1979 decision:

"19. In the Board's view Gradon in presenting himself for employment on October 2nd, and in accepting assignments given him between October 2nd and 18th, and in endeavouring to have his work assignments brought within the terms of the Board's Order, through discussions with his supervisors, had acted with mature discretion and had done everything which could be reasonably expected of him to facilitate an implementation of the Board's Order. The respondent employer, on the other hand, was embarked on a deliberate course of devising work assignments for Gradon such as would isolate him from contacts with other bargaining unit employees and it is this course which is at the root of the failure to restore Gradon to his previous job.

20. Gradon's withdrawal from the respondent's employ on October 18, 1978 may be a factor to consider in respect to his obligation to mitigate damages, but, we know of no obligation on Gradon to continue to make himself available for employment with the respondent under circumstances other than would be in compliance with the Board's Order. The respondent has failed, since the date of the Board's Order, to recognize its non-compliance and in our view such failure was continuing during the hearing despite a purported termination of Gradon's employment initiated by the respondent; such purported termination cannot, in our view, be permitted to dissolve the, as yet unfulfilled, obligation of the respondent to reinstate Gradon in the job he occupied as of May 3, 1978."

The following day, December 5, 1978, the Board's Order dated September 27, 1978 was duly filed pursuant to section 79(5) of the Act in the Office of the Registrar of the Supreme Court.

6. On November 6, 1978, the Board received a request from the applicant that it reconsider its decision of October 12, 1978 insofar as it concerned the grievor Hoyer. By a decision dated December 18, 1978, the same panel of the Board which had rendered the decisions dated September 27, October 12 and December 4, 1978 refused the applicant's request for reconsideration.

7. On June 6, 1978, the applicant filed with the Board an application for certification for the employees of the respondent at its Barrie operation. In accord with its normal practice the Board separated the full-time employees from the part-time employees and placed them in separate bargaining units. In paragraph 7 of the application, the applicant referred to its complaint against the respondent filed on May 8, 1978 and reserved its right, pending a determination by the Board of that complaint to request at the certification hearing that

the Board apply section 7a of the Act. In a decision dated November 24, 1978 (Board File 0475-78-R, unreported), this panel of the Board, a panel differently constituted from the panel which disposed of the various section 79 proceedings which arose out of the complaints of May 8, 1978, found that more than fifty-five per cent of the employees in the full-time unit had evidenced membership support for the applicant and issued an interim certificate to the applicant in respect of the full-time unit. With respect to a second unit composed of all regular part-time employees and summer students employed by the respondent at Barrie save and except a number of exclusions not here relevant, the membership evidence before the Board was sufficient only to cause the Board to direct the taking of a representation vote and as a result the applicant asked the Board to apply section 7a in respect of this part-time unit. It is that request which is the subject of these proceedings.

8. The respondent has applied to Divisional Court for review of the Board's decisions dated November 24, 1978 and December 4, 1978. These applications are presently pending in the Court.

9. The applicant recently filed Section 79 complaints on behalf of two other employees of the respondent alleging that the respondent in dealing with these two employees has contravened sections 56, 58 and 61 of the Act and asked that these be heard together with the section 7a application. The Board agreed that they should be heard together but was then advised that the grievor in one of these cases was confined to hospital for an indefinite period. The Board adjourned that section 79 complaint. During the course of these proceedings the applicant sought leave to withdraw the other section 79 complaint and in accord with Board practice it was dismissed.

10. Counsel for the applicant submitted that the Board in disposing of this request for an application of section 7a should rely without further proof on the fundamental findings of law and fact in the Board's decisions in respect of the applicant's complaints of May 8, 1978. In addition, counsel submitted we should rely on some of the evidence set out in this series of decisions; evidence which counsel subsequently directed to our attention. In support of his submissions, counsel maintained that the Board's fundamental findings of law and fact as set out in the previous decisions were *res judicata* as between the parties to this proceeding were identical or substantially identical to those raised in the previous proceedings, the parties were estopped from relitigating these issues.

11. Counsel for the respondent argued that the Board should place no reliance whatsoever on the Board's decisions dated September 27, 1978, October 12, 1978 and December 4, 1978. He submitted that as a precondition to the application of the doctrines of *res judicata* or issue estoppel there must exist an identity of issues between proceedings, and that the issues raised and disposed of by the Board, in the proceedings derivative of the applicant's complaints of May 8, 1978, were significantly different from those presently before the Board. It was his position that although a finding of a contravention of the Act is a necessary component to the exercise of the Board's discretion under section 7a, the section should be read in its entirety and in the context of the purposes which it was designed to serve and, it is his submission, that the issues raised by a request for an application of section 7a vary significantly from those raised by a complaint under section 79. It would be unfair, in counsel's opinion, for the Board to rely on findings of law and fact based on evidence adduced by the examination and cross-examination of witnesses where examination and cross-examination were in contemplation of issues and results fundamentally different from those presently before the Board.

12. Counsel also argued that the decisions of September 27, 1978 and October 12, 1978 could not be relied upon because they turned on the respondent's failure to discharge the onus of proof placed upon it by section 79(4a) of the Act. In other words, counsel contended that the onus of proof under section 79(4a) rests upon the employer to disprove the complainant's allegation, whereas the onus of proof under section 7a rests upon the trade union to prove a contravention of the Act and this difference is sufficient to preclude the application of the doctrines of res judicata or issue estoppel. Finally, counsel contended that the Board cannot rely on its decision of December 4, 1978 because that decision is now the subject of a judicial review before the Divisional Court and as such lacks the requisite finality necessary for an application of the doctrines of res judicata or issue estoppel.

13. The issue before the Board is to what extent, if any, it can make use of its earlier findings and the statement of evidence contained in its earlier decisions in deciding this matter. In respect of its prior findings the answer depends on whether it is appropriate in this case to apply a doctrine analogous to a plea of res judicata. In *re Canadian General Electric Company Ltd.* [1978] OLRB Rep. Apr. 384, the Board set out the conditions necessary to the establishment of a plea of res judicata or issue estoppel. These are:

- a) that the decision in question was a "judicial decision" as that term is understood in law,
- b) that the particular decision relied upon was in fact pronounced as alleged,
- c) that the tribunal pronouncing the decision had jurisdiction to do so,
- d) that the decision was final,
- e) that the decision was, or involved, a determination of the same question as that sought to be contravened in the litigation in which the estoppel is raised, and
- f) that the parties to the decision, or their privies, were the same persons as the parties to the proceeding in which the estoppel is raised, or their privies, or, if it should be found that they were not, that the decision was conclusive *in rem* and, therefore, binding as against any and all future parties.

(See generally *The Doctrine of Res Judicata* [London, Butterworths, 2nd ed., 1969] pp. 18 – 19 and Sopinka and Lederman, *The Law of Evidence in Civil Cases* [Toronto, Butterworths, 1974] pp. 365 – 366.)

14. Having regard to the conditions necessary to establish a plea analogous to a plea of res judicata or issue estoppel as set out above, the Board is of the view that its prior decisions were judicial decisions as that term is understood at law and that it had jurisdiction to pronounce them. The Board is also of the view that these decisions were final. In reaching this conclusion the Board has considered its powers of reconsideration under section 79 and the High Court's decision in *Re Regina v. OLRB ex parte Trenton Construction Workers*

Association [1963] 2 O.R. 376 (H.C.). For the reasons set out in the *Canadian General Electric Co. Ltd* case (supra), we are of the view that the existence of a power of reconsideration is not inconsistent with an application of the principles analogous to the principles of res judicata or issue estoppel. As for the decision of the Court in *re Regina v. OLRB ex parte Trenton Constroction Workers Association*, (supra), we are of the view that the facts and issues in that case are distinguishable from those presently before us. There the applicant applied for certification and in disposing of its application the Board was required to determine its trade union status as of the date of the application. In so doing the Board relied extensively on findings relevant to a determination of status at a point in time prior in time to the date of the application. In effect the Board failed to determine the trade union's status as of the date mandated by statute and whereas its earlier decisions were final, they were final only insofar as they pronounced on facts and issues before the Board as of the date of its earlier decisions; facts and issues irrelevant to the Board's functions on the date of the trade union's subsequent application. Here the decisions of September 27, 1978 and October 12, 1978 pronounced on facts and issues within the same temporal boundaries as those generated by the request for an application of section 7a and as such are final with respect to issues of fact and law raised within these boundaries.

15. The Board is also of the view that the parties to the decisions of September 27 and October 12, 1978 were the same as the parties to the present proceedings. The Board finds as well that the issue raised and decided by these two earlier decisions is identical to one of the issues presently before the Board, namely, whether or not there has been a violation of the Act. In reaching this conclusion the Board has taken into account the fact that the reverse onus of proof applied in the earlier proceedings. The earlier findings were made under section 79 of the Act, the procedural vehicle for dealing with all alleged contraventions of the Act. In the Board's view, section 7a contemplates that findings made under section 79, including those under section 79(4a) can be applied by the Board in determining whether a trade union may be certified under that section. Even where such previous findings are used, however, it is still incumbent upon a trade union seeking certification under section 7a to establish that, in the circumstances of the case before the Board, these contraventions create a situation where the true wishes of the employees would not likely be ascertained and that it has membership support adequate for collective bargaining. These latter two factors are critical qualifications to the application of section 7a and the burden rests with the trade union in respect of both.

16. The Board rejects counsel for the respondent's argument that given the differences in the context of and purposes served by sections 7a and 79, it would be unfair for the Board to rely on its previous decisions. The respondent is or should have been fully aware of the unique interrelationship between the two sections, and moreover, has had notice since some time in early June, a point in time long in advance of the Board's adjudication request that it be certified under section 7a. A finding by the Board under section 79 that there has been a violation of the Act is a final and conclusive finding for all purposes including the precondition to the application of section 7a that there be a violation of the Act. The fact that an application for judicial review relating to certain of the Board's earlier findings is now pending does not make these findings any less final in so far as the Board is concerned. The Board's decisions stand until they are actually quashed by the Courts on judicial review.

17. Having regard to all of the foregoing the Board is satisfied that its decisions of

September 27, 1978, October 12, 1978 and December 4, 1978 are res judicata in respect of the allegations dealt with therein. The Board is not prepared to allow the issues raised therein to be relitigated as part of the 7a proceedings; rather the Board relies on the fundamental findings of law and fact contained in these decisions which are now a matter of record. The Board hereby reiterates its oral ruling given at the commencement of the hearing on March 7th that insofar as the first precondition to the operation of section 7a is a finding that there has been a violation of the Act, the Board is satisfied on the basis of the decisions referred to above, that:

- (1) Henry North and Stephen Gradon, employees of the respondent were discharged on May 3, 1978 in contravention of The Labour Relations Act.
- (2) That William Vernon, John Oosterdag and Sherry Hoyer, employees of the respondent were discharged on May 3, 1978 and such discharges were not in violation of the Act.
- (3) That in reinstating Gradon to the job described in paragraph 12 of the Board's December 4th decision the respondent failed to comply with the Board's order dated September 27, 1978.

18. The Board, however, can take the previous decisions no further. The Board rejects the applicant's submission that it should accept as evidence and rely upon the statements of evidence recorded by the differently constituted panel of the Board which heard and ruled upon the prior section 79 complaints. Technically, these statements of evidence are hearsay before this panel of the Board. More importantly however, given the nature of section 7a of the Act and the difficulty of ascertaining whether a contravention or contraventions of the Act have resulted in a situation where the true wishes of the employees are not likely to be ascertained, the Board is of the view that it should hear first-hand all of the evidence relevant to the latter two conditions necessary to the application of section 7a. While the fundamental findings of fact and law contained in these decisions are a matter of record and establish conclusively that the employer has violated the Act as described above, the Board is not prepared to rely on the statements of evidence set out in these decisions in determining whether the proven violations are such as to make it unlikely that the true wishes of the employees cannot now be ascertained by the taking of a representation vote.

19. This panel of the Board found in its November 24th decision that the respondent company lent its tacit support and approval to the circulation of an anti-union petition on company premises and during working hours between June 8 and June 13, 1978. The Board heard evidence that shortly before the circulation of the anti-union petition the employer posted a notice forbidding all pro-union solicitation on company premises during working hours. The evidence further established that three members of management were told by bargaining unit employees that Steve McCullough was circulating an anti-union petition. Notwithstanding the fact that management was concerned with and alerted to union solicitation and had been informed of Mr. McCullough's activities, he was allowed to circulate the anti-union petition during working hours unimpeded by management. The Board found that the company by failing to stop his solicitation of employees on company premises during working hours, as it had announced it would do in respect of pro-union solicitation, and as it did in respect of Mr. Henry North Sr., lent tacit support and encouragement to the circulation of the anti-union petition.

20. The union led evidence in respect of an encounter during the union's organizing campaign between Mr. Henry North Sr., a bargaining unit employee with the company and Mr. Roy Murden, the company's Director of Personnel and Security. The evidence establishes that Mr. North Sr. asked Mr. Mike Shrubsole, another bargaining unit employee, for his address. When asked by Mr. Shrubsole why he wanted the address Mr. North replied that it was for his son and perhaps it had to do with the union. Mr. North Sr. testified that the following morning he was informed by Mr. Murden that the company frowned on this type of action and if necessary, would take disciplinary action against persons soliciting for the union on company premises and on company time. Mr. North Sr. had no further contact with Mr. Murden and there is no suggestion that he was ever discriminated against or otherwise dealt with contrary to the Act because of his trade union affiliation. The Board finds nothing unlawful or untoward in Mr. Murden's comment to Mr. North and attaches no weight to this incident in deciding if it should apply section 7a of the Act.

21. The union also led evidence in respect of an encounter between Mrs. Alice Walker, a bargaining unit employee and Mr. Ross Onckles, her foreman, in June 1978. Mrs. Walker gave uncontradicted evidence that Mr. Onckles said to her and another bargaining unit employee – "if the union gets in the company will pack up and move out west." Mrs. Walker testified that rumours to this effect were present throughout the plant. It was established in cross-examination that Mr. Onckles' statement was made before the certification of the full-time unit following which the company moved its operation to a modern facility in Barrie and the parties commenced to bargain. Mrs. Walker gave further evidence that on another occasion in June Mr. Onckles announced that the employees would not be getting a 7 per cent wage increase scheduled for July. The evidence establishes that the employees did in fact receive the 7 per cent increase in July as scheduled. The company argues that its decision to move to new facilities in Barrie and to commence to bargain with the union following certification of the full-time unit, when coupled with the erroneous information given by Mr. Onckles in respect of the holding back of the 7 per cent wage increase scheduled for July, must cause the Board to conclude that the employees are not presently threatened or intimidated by his statement in June that the company would move out west if the union were to get in. While the subsequent events diminish the weight we might otherwise give to his statement in respect of its possible effect on free expression in a secret ballot vote, the Board is of the view, having regard to the fact that the parties have not as yet formalized their relationship in respect of the full-time bargaining unit in a collective agreement, that Mr. Onckles' statement, which lent credence to rumours circulating in the plant was the most serious type of unlawful threat which could be made by an employer in the circumstances and one not easily forgotten by the employees who might be affected. Mr. Onckles' threat was in violation of the Act and it is a relevant factor to be considered by the Board in deciding if the true wishes of the part-time employees can be ascertained by the taking of a secret ballot vote.

22. The Board also heard evidence from Mr. S. Gradon in respect of the terms of his reinstatement following the Board's order that he be reinstated to his former job. The evidence establishes that he was not reinstated to his former job but to a less desirable job in the warehouse that had been vacated by the company. His work location and his work schedule were deliberately designed by the company to isolate Mr. Gradon from the employee body. The day after he distributed pro-union leaflets to employees arriving for work at 8:00 a.m., his starting time was changed from 8:00 a.m. to 7:00 a.m. and he was directed to proceed to the city dump with company garbage upon commencing work. Similarly, his

coffee breaks and lunch breaks were scheduled not to coincide with those of other bargaining unit employees. Mr. Gradon withdrew his services on October 17, 1978 subject to reinstatement as per the Board's order of September 27, 1978. Although it was not revealed to the company until the hearing in this matter that Mr. Gradon would not return to his previous job if it was offered to him, at no time since October 17th has the company offered Mr. Gradon his previous job in compliance with the Board's order. Mr. Gradon was one of six in-plant organizers used by the union and clearly the company's failure to restore Mr. Gradon to his former job, as directed by the Board, must be viewed as an unlawful company initiative which would cause any bargaining unit employee with reasonable intelligence to be concerned about the protection afforded to him under The Labour Relations Act and the viability of the Board's process to adequately redress proven violations of The Labour Relations Act.

23. A number of written company and union statements to the employee body were placed in evidence. Both the company and the union communicated with the employees in this manner on a regular basis between May 28, 1978 and February, 1979. The Board is satisfied on an examination of these statements that they do not constitute undue influence, threats, coercion or intimidation in violation of the Act. Of greater concern to the Board is the company's written statement dated December 13, 1978 which is entitled "Report of Labour Board Examiner's Investigation." The Board in its decision of November 24, 1978 certified the applicant under section 6(1a) of the Act in respect of the full-time unit subject to a final resolution as to the composition of the bargaining unit. The parties were in dispute as to the employee status under the Act of four persons and accordingly, the Board appointed a Labour Relations Officer to meet with the parties, inquire into the duties and responsibilities of those in dispute and report to the Board. The inquiry by the Board's officer was conducted on Wednesday, December 13th and formed the subject of the aforementioned company report to its employees.

24. The report makes reference to the union having been allowed "*to attack*" the employees whose duties and responsibilities were being inquired into by the Board and refers to the Board's witnesses as "*victims*". The statement makes reference to two of the employees who were required to testify before the Board officer in respect of their duties and responsibilities as being "pulled into the Steelworkers union against their will under threat of subpoena" and in reference to the decision by the Board that they testify asks the rhetorical question, "Where is your freedom of choice now?" The Board officer properly ruled at the hearing that the company could not ask these employees whether they wanted to be in the union's bargaining unit. The direction from the Board to the officer as contained in its November 24th decision was that he inquire into duties and responsibilities only. The respondent never requested the Board to alter or amend the direction. In any event, the Board is charged under the Act with preserving the secrecy of employee choice in respect of union support. The company, in response to the ruling that the question could not be asked put to the employee body the further rhetorical question in respect of the Board's procedure, "How can the full story be told if you are precluded from answering questions?" In conclusion, the company asked its employees, "Why did the Labour Board deprive you of your democratic right to a private vote?"

25. There is no question that the company's statement was designed to give the employees a false impression of the Board's procedures and, more importantly for our purposes, to convey to the employees the employer's disrespect for these procedures. It is the

Board's view that the statement, which borders on contempt, served to further erode the confidence which employees normally have in the processes established under the Act to guarantee freedom of choice and redress employer violations of the Act. The statement must be considered by the Board in conjunction with the continuing failure of this employer to comply with the Board's order in respect of the reinstatement of Mr. Gradon in deciding whether or not, in the context of this organizing campaign, the true wishes of the part-time employees would likely be ascertained in a secret ballot vote.

26. In February the company made available to its employees bright red "T" shirts embossed on the front with the words, "*We're company finks*" and on the back with the words "*and proud of it.*" In its written statement of February 16th the company advises its employees that the union is claiming that the company should not have given out "T" shirts and has "run to The Labour Board and filed an application against the company. The Labour Board hearing was scheduled for February 20th. The company followed by making reference to the Steelworkers jackets and commenting that a new supply of "T" shirts would be available at the Personnel Office on Wednesday, February 21, 1979, the day following the scheduled Board hearing to determine if the employer's actions were in violation of the Act. Mrs. Walker, who admitted in cross-examination that the first reference to "company finks" appeared in a union bulletin, testified that between 20 and 30 of the company's approximately 170 employees were supplied with and wore the above-described "T" shirts during working hours. Notwithstanding the fact that the reference to "company finks" was first contained in a union bulletin, the Board views the company's decision to obtain and distribute these "T" shirts to its employees as a deliberate and unsophisticated attempt to polarize the workforce which must be considered by the Board in assessing the atmosphere which prevails in the workplace.

27. Certification under section 7a of the Act is an extraordinary process which is not applied by the Board in response to all employer violations of the Act during the course of a union's organizing campaign. The Board is given broad remedial authority to rectify breaches of the Act and accepts that in most situations employees feel protected by the rule of law established under the Act so that they are not unduly influenced when making a secret ballot choice by employer violations of the Act which do not constitute direct threats to the employees' job security or promise of general economic advantage dependent upon whether or not a union is certified. Notwithstanding the absence of this type of violation in the instant case, the Board is satisfied that the employees of the respondent could not feel protected by the rule of law and confident in the efficacy of the protections afforded under the Act such that their true wishes would likely be ascertained by the taking of a secret ballot representation vote.

28. It is established that the employer terminated two of the six employee organizers in violation of the Act and failed to comply with the Board's order in respect of the reinstatement of one of these employees. The complaint that the employer failed to comply with the Board's order of reinstatement in respect of the second employee was withdrawn, without prejudice, by leave of the Board in its December 4th decision. It is established that the employer, while forbidding pro-union solicitation on its premises, and strictly enforcing its directive, lent its tacit support to the circulation of an anti-union petition on company premises and during working hours. It is established that in violation of the Act a company foreman warned two bargaining unit employees that if the union got in the company would move out west, thereby lending substance to rumours to this effect in the plant. It is estab-

lished that the company supplied bright red "T" shirts to its employees embossed on the front with the words "I'm a company fink" and on the back with the words "and proud of it", thereby further polarizing the workforce and further identifying itself as a combatant in the process. Can there be any doubt in the minds of the employees who are the subject of this application that the company is strongly opposed to their unionization and is prepared to resort to unlawful initiatives in response to it? Given this background and the respondent employer's disrespect of and disregard for the processes established by law to protect employees in the exercise of their statutory freedom to join a trade union of their choice, is it likely that the part-time employees at Radio Shack would now express their true wishes in a secret ballot vote? The Board is of the view, and hereby finds, that it is unlikely that the true wishes of the part-time employees would likely be ascertained by the taking of a secret ballot vote in this case.

29. The Board is satisfied on the basis of all the evidence before it that the applicant union currently enjoys membership support adequate for the purposes of collective bargaining.

30. The three conditions precedent to the application of section 7a have been satisfied. Accordingly, the Board hereby certifies the applicant under section 7a of the Act as bargaining agent for all employees of the respondent who are regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except foremen and persons above the rank of foreman, office and sales staff.

31. A certificate will issue to the applicant.

DECISION OF BOARD MEMBER W. GIBSON:

1. I dissent.

2. I agree with the Board in its finding that the employer has contravened the statute.

3. However, I cannot agree with the Board's conclusion that the employer's conduct has created an environment in which it is unlikely that the true wishes of the employees can be ascertained. In my opinion a representation vote should be held.

4. The history of the proceedings between the parties recounted by the Board in its decision strongly indicates the protracted and bitter nature of their dispute. Their relation has been marred by acrimony, hostility and intense feelings of mistrust. Regretfully, their conduct and attitudes towards one another have spilled over into the workplace. The employees are deeply divided in their loyalties, polarized into pro and anti union factions. Both sides must share responsibility for this unfortunate state of affairs. The employer is guilty of a number of contraventions of the statute. At times its conduct has been reprehensible. The trade union, for its part, has utilized the Board's processes to harass the employer. It has filed no less than seven unfair labour practices charges against the employer, of which all but two have been dismissed by the Board. It has contributed in a significant way to the polarization of the work force. The evidence establishes that the term "company fink" embossed on the front of the T shirts distributed by the company and of which the Board heard so much testimony was first introduced into the plant by the trade union through the

instrument of one of its many pieces of campaign literature. The derogatory labelling of employees expressing their statutory right to refuse to support the trade union regardless of reasons motivating their opposition can only have had the effect of forcing these employees to seek management's shelter and, in so doing, provided further justification for the employer's perceived need to protect its employees from what it regarded as abusive conduct by the trade union in its organizing campaign.

5. The Board in its decision has made reference to statements made by a company foreman, Mr. Ross Onckles, sometime in June of 1978 to the effect that the employees would not be receiving a scheduled wage increase and that the company would move out West in the event that the trade union got in. In my opinion, while both statements may constitute a contravention of the Act, they are without weight in determining whether to apply section 7a. The statements were made nearly nine months ago. Since then, the employees have received their scheduled wage increase, the company has constructed and moved its operation into a modern new facility, the Board has certified the full-time bargaining unit and the parties have commenced negotiations for this unit. Whatever effect Mr. Onckles' statements may have had on the employees in June of 1978 have surely been dissipated by intervening events.

6. The Board in its decision has referred extensively to the employer's disrespect of and disregard for the processes established by law. In this respect, the employer's treatment of the grievor, Gradon, and its statements contained in its communication of December 13, 1978, are deplorable. Nevertheless, I am of the opinion that the employer's attitude towards the processes established by law as manifested in its treatment of Gradon and in its communication of December 13, 1978 does not warrant an application of section 7a.

7. Under section 7a, the Board must find amongst other things that the employer has contravened the Act in such a way that the true wishes of the employees are not likely to be ascertained by a vote. In those cases where the Board typically involve threats to employee job security. Because of the dependence of employees upon their employer for their economic livelihoods, such threats are regarded as exerting a strong influence upon employees in their decision as to which way they should cast their ballots. A decision to vote in favour of trade union representation is perceived by the employees as carrying with it the potential loss of employment. Such threats seriously undermine the employees' freedom guaranteed by section 3 of the Act.

8. In this case there is no real perceived threat to employee job security at issue. Rather the Board has grounded its decision to apply section 7a on an inference which it draws as to the likely effect upon employee choice of the employer's disregard for the "rule of law". If the employees' freedom of choice has been jeopardized by the employer's conduct, it has been so jeopardized, in the Board's view, not because of employee perceptions of the consequences of a "yes" vote but rather because of a perceived threat by employees to the secrecy of the ballot itself and the consequences upon employee choice ensuing therefrom. In my opinion, the Board in drawing such an inference is not proceeding with that degree of caution demanded of it in applying the extraordinary provision of section 7a. I am not prepared to assume for the purposes of section 7a that these employees who have been bombarded with propaganda from both sides for nearly nine months now are likely to be very much affected by the employer's communication of December 13, 1978. Nor am I prepared to assume that these employees are so naive and unsophisticated that they are likely

to regard the employer's past conduct as constituting a serious threat to the Board's ability to ensure a secret vote. The Board is a public agency armed with public authority aided by the power of the courts and backed by power of the Government. Surely these employees no matter how economically dependent upon their employer they might in fact be do not for a moment consider it at all possible that their employer is capable of undermining a Board regulated vote.

9. On the basis of all of the foregoing consideration, I would have dismissed the application and ordered a representation vote.

1793-78-U United Steelworkers of America, (Complainant), v. TCE Canada A Division of Tandy Electronics Limited), (Respondent).

S-79 – Discharge for Trade Union Activity – Employee discharge not motivated by antiunion animus – Complaint dismissed

BEFORE: Donald D. Carter, Chairman, and Board Members J. D. Bell and O. Hodges.

APPEARANCES: *Pamela A. Sigurdson and Gaye Lamb for the complainant; Donald J. McKillop, Q.C., John Irvine and James E. Bowden for the respondent.*

DECISION OF THE BOARD; March 28, 1979

1. This is a complaint under section 79 of the *Labour Relations Act* alleging that the grievor was discharged for union activity, and seeking the reinstatement of the grievor with full compensation.

2. The grievor, Verna Hunt, was discharged from the employ of the respondent company on January 19, 1979. The reason given at that time for her discharge was her participation in horseplay during working hours that resulted in an injury to another employee. The question before the Board is whether the respondent's only motive for discharging the grievor was the reason stated, or whether the respondent's decision was also motivated by the grievor's earlier participation in union activity.

3. It is not disputed that the grievor was involved in an incident that resulted in a potentially serious injury to another employee, nor is it seriously disputed that the resulting injury was other than accidental. The incident occurred in the respondent's plant in the afternoon of January 18th. A group of employees were engaged in the bagging and packaging of electronic cables – the bagging being done at one table and the packing of these bags into boxes being done at another table. The two tables were located about fifteen to eighteen feet from each other. One of the plastic bags in which a cable had been placed had been ripped on one side, and this defect was discovered by Marianne Jones, one of the employees assigned to the task of putting the bagged cables into cardboard cartons for shipping. Apparently, Jones threw the defective item back on to the first table from a distance of approximately four to six feet, and indicated that it was a reject. The grievor Hunt, not seeing the

rip in the bag, then threw it back with the words, "It's not a reject." Jones then threw it back to Hunt again saying, "Look closer, it's a reject." Hunt then proceeded to throw it back to Jones at her table some fifteen feet away, indicating that Jones could fix the package herself. Unfortunately, the cable did not land on the table, but hit another employee, Dorothy Atkinson, at the back of her neck.

4. As a result of this blow to the back of her neck, Atkinson knees went weak and she collapsed over the work table. Feeling nauseated, she proceeded to the company cafeteria to recover. After an unsuccessful attempt to return to work, she was taken to the emergency department of the hospital for examination. She was informed by the attending physician that her neck was badly bruised and that she was suffering from muscle spasms. The physician indicated that she was fortunate as she might have been paralyzed by the blow. Atkinson was off work for six days as the result of the accident, and, at the time of the hearing, she was still wearing a neck collar.

5. Glen Lancaster, the plant foreman, testified that Atkinson informed him of the injury at the end of her shift, whereupon he suggested that she be taken to hospital. Later, on that same day, he discussed the incident with Linda Whitlock, the supervisor in charge of the employees involved in the incident. Lancaster also testified that early the next morning two employees, Barbara Lawler and Rosemarie Lavalley, came to him and gave their account of the incident. Lancaster did not identify the time at which these interviews occurred but Lawler, although expressing some uncertainty, put the time after the start of work at 7:30 a.m. Lancaster testified that after these interviews he received a call from Hunt's husband who indicated that she was not up to going to work that day. In reply Lancaster indicated that he wished to speak to Hunt before she returned. Lancaster then discussed the matter with the plant manager, John Ervine, and it was decided that Hunt should be discharged. Then, fifteen minutes after the call from Hunt's husband, Hunt called and Lancaster informed her of the decision to dismiss her. Lancaster testified that on that same day he spoke to Jones, the other participant, and issued her a written warning for her involvement in the incident. Under cross-examination Lancaster acknowledged that he was aware that Hunt had supported the applicant union in its recent, unsuccessful organizing drive while Jones had not been a union supporter.

6. Verna Hunt testified that her husband phoned the plant at 7:15 a.m. to report to Linda Whitlock that she would be unable to work as she was not feeling well. Her husband spoke to Lancaster instead, who asked that Hunt phone him before she returned to work. Hunt then phoned Lancaster at 7:30 a.m., at which point she was told that she was fired.

7. The evidence given at the hearing was that horseplay was not uncommon in the respondent's plant, and that Lancaster himself had engaged at times in horseplay with the employees. It appears that Hunt's dismissal and Jones' warning constituted the first occasion on which discipline had been imposed for horseplay, although it was also the first incident where horseplay had led to a serious injury.

8. Some evidence was introduced relating to the respondent's conduct during the union's organizing drive. Apparently in October, when the union was organizing, a number of employees who were union supporters, including Hunt, were given final warnings for absenteeism. From the evidence, however, it appears that these employees had been absent fairly frequently prior to the issuing of the warnings.

9. The evidence also revealed that Linda Whitlock, an employee who had some supervisory responsibilities, on more than one occasion voiced opposition to the union, and expressed fears to other employees that the plant might close if the union were to be successful. Another employee, Helen Locke, who appears to have performed some supervisory duties, also indicated her opposition to the union during the organizing drive. At about the same time as these statements were made, a notice, apparently prepared by employees, and setting out the benefits then provided by the respondent, appeared on the bulletin board in the respondent's cafeteria. Both Whitlock and Locke, however, by agreement of the applicant and the respondent, were treated as employees for the purpose of the Board's certification vote.

10. It is clear from the evidence that after the Board's certification vote, where a majority of employees voted against the applicant union, there remained an undercurrent of tension between those employees who had supported the applicant union and those who had opposed it. Some time after the vote Ervine, the plant manager, met with the employees, telling them that the vote was over and to get on with their own business. Despite these remarks the tension between the two groups did not dissipate and rumours that the union supporters would be terminated continued.

11. On these facts can it be said that the respondent has established on the balance of probabilities that its only motive for Hunt's dismissal was the horseplay that led to Atkinson's injury? The Board in answering this question must take into account such factors as the existence of a pattern of union activity, the extent of an employer awareness of the discharged employee's involvement in union activity, the lapse of time between that union activity and the point of discharge, the manner in which the employee was discharged, and the credibility of these witnesses testifying as to the relevant events. It is only after such considerations are put in the balance that the Board can draw a conclusion as to the motives underlying the conduct in question.

12. In this case it is quite clear that the respondent was aware that Verna Hunt had been a supporter of the union in its organizing drive during the fall. That organizing drive culminated in the certification vote held on November 22nd which was lost by the union. Hunt's discharge occurred about two months after the vote at a time when the applicant union did not appear to have an active presence in the plant.

13. The circumstances of this case do not appear to be on all fours with those in *Fielding Lumber Co. Ltd.*, [1975] OLRB Rep. Sept. 665, a case cited as authority by counsel for the applicant union. Unlike the *Fielding Lumber* case, there is in this case no distinct pattern of anti-union activity on the part of the employer. While there was some evidence that Linda Whitlock and Helen Locke made statements unfavourable to the union in the presence of other employees, these two persons were regarded by the union as employees for the purpose of the vote. In these circumstances it is difficult to regard the statements of these two persons as being inspired by management. As for the written reprimands given to some employees for absenteeism, while this exercise of the managerial power to discipline might be construed as an attempt to influence the union's organizing drive by a selective disciplining of union supporters, there is very little hard evidence to support that conclusion. Furthermore, there is no evidence of anti-union conduct following the certification vote, making it even more difficult for the Board to discern any clear pattern of anti-union activity on the part of the respondent. In this case, moreover, unlike the *Fielding Lumber* case, the un-

ion no longer had an active presence in the plant at the time of the discharge. While a division still remained between the two groups of employees at the time of discharge, there is absolutely no evidence to suggest that the respondent employer was attempting to encourage this division. As a result, it is difficult for the Board to conclude from this evidence that Hunt's discharge was the latest piece in a pattern of anti-union activity established by the respondent.

14. Notwithstanding the lack of a clear pattern of anti-union activity, the Board has some concern about the manner in which Hunt was discharged. Although it is not the Board's task in this type of case to determine whether the employee was discharged for cause, an employer's actions may be so unreasonable as to suggest that there may be an anti-union motive underlying the discharge. While it can be argued in this case that the employer reacted too hastily, and that the discharge of Hunt was excessive in the circumstances, the respondent's conduct cannot be characterized as totally unreasonable. There is no doubt that the incident in which Hunt had become involved had resulted in a potentially serious injury to another employee. Although horseplay had been condoned on earlier occasions, the respondent's change of attitude toward this kind of conduct appears plausible in the light of the injury that resulted from this particular incident. It is true that Jones, the other participant, did not receive as severe a penalty as Hunt, but Hunt's responsibility for the resulting injury appears to be greater.

15. The Board is somewhat troubled by Lawler's testimony that she met with Lancaster some time after 7:30 a.m. on January 19th, which would put that meeting some time after the point at which Hunt was informed of her dismissal. This evidence would indicate that management had reached its decision to dismiss Hunt prior to getting a first-hand account of the incident from Lawler and Lavelle. Our concern about this point of evidence, however, is not sufficient to justify a conclusion that Hunt's discharge was for a reason other than that given at the time of discharge. It is our conclusion, therefore, that the respondent has established that its discharge of Verna Hunt was not motivated by any anti-union animus.

16. Accordingly, this complaint is dismissed.

0934-78-M Transit Windsor, (Applicant), v. Division 616, Amalgamated Transit Union, (Respondent).

Employee – Reference – Whether transit inspectors are employees

BEFORE: R. O. MacDowell, Vice-Chairman and Board Members J. D. Bell and D. B. Archer

APPEARANCES: *Hugh Geddes, Q.C. and Donald Castle for the respondent; L. C. Arnold, David Jewhurst and Arthur Burke for the applicant.*

DECISION OF THE BOARD; March 23, 1979

1. This is an application under section 95 of The Labour Relations Act. The applicant employer seeks a determination whether, in the opinion of the Board, the employees occupying the positions of "Inspector", "Dispatcher" and "Garage Foreman" exercise managerial functions within the meaning of section 1(3)(b) of the Act.

2. Transit Windsor operates the public transportation system in the City of Windsor and employs some 140 bus drivers who operate their vehicles on prescribed routes and schedules. The applicant and the respondent have had a bargaining relationship for more than fifty years, and since at least 1964, the disputed classifications have been included within the scope of the collective agreements between them. Throughout this period the extent of the union's bargaining authority has been expressly limited. All of the collective agreements provide that the "union shall have no right to represent or bargain for Foremen, Dispatchers, and Inspectors except in regard to their wages, fringes and dismissal from employment." This restriction sets these employees apart from others whom the trade union represents, and suggests a long standing acceptance of the fact that they exercise responsibilities which make full trade union representation inappropriate. Indeed, Article 15 of the most recent agreement imposes an obligation on all drivers to *obey* the orders of Inspectors, Dispatchers and Foremen, and recognizes that such orders might give rise to a grievance. The potential for friction between these two groups is apparent, and while neither counsel addressed this problem directly, it was an undercurrent which ran through the evidence of those inspectors who were called as witnesses. This probability of conflict does not arise because the Inspectors, Dispatchers and Foremen have different collective bargaining objectives from their fellow employees, but rather is inherent in a situation where one group of employees is required to obey the orders of another. Nonetheless, for at least fifteen years the employees in the disputed classifications have been considered part of the bargaining unit, and the trade union has represented them to the extent that it was entitled to do so.

3. In October, 1977, the applicant began to reorganize the transit service, in accordance with the report of a group of transportation consultants who had earlier been hired to analyze the system, and make recommendations for improvement. The company introduced new logos and colour scheme, acquired additional vehicles and communications equipment, and sought to rationalize its management structure so that there would be closer supervision and control over the movement of vehicles. Since it is the inspectors "on the street" who are primarily responsible for the orderly flow of vehicles and the efficient matching of buses to customer demand, the role of the inspector began to change. Authority which was exercised infrequently in the past, began to be exercised more frequently and systematically. There is no doubt that the present system of supervision is more continuous, uniform and coherent than was the case in the past. The inspectors now meet periodically (which they did not do in the past) to discuss the problems which they are encountering, and work out common solutions. This situation results, at least in part, from the efforts of the new assistant supervisor of transportation, who had previously been both an operator and an inspector, and had been dissatisfied with what he considered to be the limited scope of the latter position. He has attempted to attract younger, more vigorous persons ("new blood") to the position, has sought to increase their input into management (by meetings and otherwise) and has encouraged them to exercise their own initiative. Nevertheless the situation is still in a state of flux. The basic functions of inspectors and dispatchers have not changed. The degree of authority exercised is still carefully circumscribed. Ultimate authority still rests with senior levels of management.

4. The Labour Relations Act does not set out the specific criteria to be applied in determining whether a person exercises managerial functions; yet the Act requires the separation of labour and management into distinct legal categories. Important legal rights are affected by this distinction. Persons found to be "managerial" are denied access to the collective bargaining process, presumably to ensure that the employee bargaining agent is independent of employer influence, and that the interests of the employer will be represented by persons whose loyalties are undivided. As the Board noted in *Chrysler Canada Ltd.*, [1976] OLRB, Rep. (Aug.) 396:

- "12. The identification of management is fundamental to the scheme of collective bargaining as set out in the Labour Relations Act. What is contemplated is an arm's length relationship between the employees represented by a bargaining agent, on the one side, and the employer acting through management on the other side. The Act attempts to create a balance of power between these two sides by insulating one from the other. Employees, therefore, are protected from management interference and domination by the prohibitions against employer interference with trade union and employee rights. Management, by the same token, is protected by excluding from collective bargaining either persons exercising managerial functions, or persons employed in a confidential capacity in matters relating to labour relations. Collective bargaining rights, therefore, are not universal, but must be qualified by the need to preserve a countervailing force on the employer side.
13. The Act, although making clear the need to identify management, does not articulate the specific criteria to be applied in making this identification. Specific criteria, however, have been articulated in the development of this Board's jurisprudence. Two recent Board decisions, *McIntyre Porcupine Mines Ltd.*, [1975] OLRB Rep. Apr. 261 and *Inglis Ltd.*, Board File No. 0787-75-R (as yet unreported) both contain excellent statements on how the Board has gone about identifying managerial employees. The *Inglis Ltd.* decision, recognizing that the exercise of managerial functions may assume different forms, identifies two benchmark situations – one where there is direct influence upon the employment relationship, and one where the influence upon the employment relationship is only indirect. These situations, of course, are only benchmarks and there is the possibility of many variations between them, but they do serve to explain the different approaches taken by the Board.
14. The different forms that the exercise of managerial functions may assume, however, dictates that each situation must be dealt with on an individual basis. There is no general criterion that is suitable for the resolution of all situations. Likewise, there is no onus of general application where the Board is attempting to identify management. (It should be noted at this point that in this case both parties argued that there was a presumption that operated in their favour.) The fact is that this kind of problem is simply not

amenable to resolution through general approaches. Each situation must be examined in its own light in order to determine where managerial authority begins ...”

5. The line between employee and management is often shaded. While it is helpful to consider the principles articulated by the Board in previous cases, ultimately the determination must turn on the facts of the particular case. The differences in work environment between industries, and between employers in a single industry, substantially diminish the precedential value of previous decisions. In this case, both parties relied on the same Board decisions to support their respective positions. What makes this case especially difficult is that we are asked to consider an evolving supervisory structure which, for the reasons noted above, appears to have changed in the last eighteen months.

6. The role of the inspectors is to supervise the day-to-day operation of the bus system; that is, to ensure that the drivers are properly maintaining their schedules. Where necessary, the inspector can call in extra buses, require a driver to speed up, slow down or “short turn” his bus, or order a driver and vehicle to another route. The inspectors work at both fixed locations, and in automobiles equipped with two-way radios, so that they can monitor and respond to traffic flow problems throughout the system. In the event of an accident or altercation between a driver and customer, the inspectors are empowered to intervene. The apparent insignia of rank incorporated into the design of their uniforms represents to the public that they are persons in authority who can act and make enquiries on behalf of the company. The inspectors are self directed and design their own shifts which, however, are subject to final approval by senior levels of management and must generally correspond to the operator’s pre-established schedules. The inspector’s role is entirely supervisory; they do not drive buses. As has already been mentioned, the inspectors periodically meet among themselves, and with senior management, in order to discuss ways of improving the efficiency of the service. There was no evidence that the drivers hold, or participate in, such meetings.

7. All of the witnesses agreed that the inspectors were empowered to *enforce* company rules and regulations, and could remove and replace an operator if for any reason he was unwilling or unable to perform his duties. Mr. Jewhurst, President of the union, testified that inspectors had always had this power; however, the Board is satisfied that the inspectors have recently taken a much more active role in ensuring compliance with company policy, and are now exercising disciplinary powers which were exercised only sporadically in the past. In addition to verbal warnings inspectors are now, (i.e., since December, 1977,) provided with prepared forms – variously described as “tickets” or “citations” – on which they can record employee infractions. These “tickets” are recorded on an employee’s personnel file, and the trade union is advised of the occurrence. Mr. Jewhurst acknowledged that such “tickets” could result in grievance or arbitration proceedings. If an inspector considers an infraction serious enough, he can send an employee home until senior management are available to consider the matter. This results in a suspension of from one to three days, depending upon the timing of the occurrence. The two inspectors who gave evidence indicated that in the last twelve months they had given approximately eighteen “tickets” (for such infractions as insubordination, dress code violations, failure to adhere to schedule, foul language, etc.) and had sent nine persons home. There was no evidence that senior management have either imposed further penalties or rescinded these suspensions. Neither of the inspectors who gave evidence had ever imposed more serious discipline, although both believed they had the authority to do so, subject to review by their supervisors.

8. This evidence must be viewed in context. There was no evidence that since 1977 there have been incidents of the kind of serious employee misconduct which would merit the imposition of discipline – except a wildcat strike in December of 1977 during which, significantly, the inspectors crossed the picket lines of their fellow employees and continued to work. Apart from this one incident there was no evidence of serious disciplinary problems. The work force seems to be competent, conscientious and dependable so that, as a practical matter, the minor discipline and direction given by the inspectors is all that is required. While the system does not quite “run itself” as was contended by counsel for the respondent, it does not require constant managerial intervention, except to ensure that schedules are maintained and the service is adequately responding to customer demand. In order to run an efficient transit service, all of the employees must work together as a “team” – as they appear to do. One should not, however, minimize the role of the “quarterback.”

9. Despite some clear indications of managerial authority, the evidence in respect of the inspectors was by no means unequivocal. As counsel for the respondent brought out in cross-examination, their authority is clearly limited. They do not participate in the grievance procedure, nor do they have access to personnel records. Apart from sending people home in circumstances previously described, they merely report the circumstances to management and occasionally clarify the facts when asked to do so. There was little evidence of any power of recommendation – “effective” or otherwise. Their performance appraisals of new employees are probably given no more weight than those of the operators who actually do the “on the job” training. They do not hire, and have not fired, employees. Their input into senior levels of management is largely in respect of technical, rather than personnel matters. Their primary concern is the smooth operation of the transit system, which only incidentally involves the effective management of the operators. Their training program does not include a consideration of personnel issues or the proper way to effectively manage people. They have no role in establishing company policy.

10. The inspectors’ authority is restricted by the collective agreement and by the regimen of the system in which they work. The agreement provides elaborate rules for the allocation of routes, the distribution of overtime, the general allotment of work, the assignment of employees to cover emergency situations or to fill in when others are absent, and so on. This is as might be expected in an organization where it is imperative to maintain schedules and where, because of the longstanding bargaining relationship, the parties have had the opportunity to work out prescribed responses to problems which occasionally arise. The accumulation of these established practices, together with the high level of skill and experience of the operators, create a situation where the exercise of independent managerial authority is not only limited but also largely unnecessary. The witness Hayes could recall only one instance when he had to *order* an unwilling employee to do overtime work. Generally, he said, employees are anxious to work overtime, and cheerfully agree to do so, or there is an established list from which willing employees can be readily selected. Similarly, the system is designed so that it can easily accommodate an employee request for casual time off, thus minimizing the value of the inspectors’ power to grant time off as an indication of managerial authority. Nevertheless, the Board is not persuaded that the approximately 150 employees who work “in the street” are entirely autonomous, or are “managed” entirely by two or three employees who work in the office. The respondent’s operation does require a considerable degree of self direction at all levels, and responsibility is significantly diffused; however, the Board is satisfied that the first level of management is the inspectors. It is they who bear the initial responsibility of ensuring that the system operates smoothly and the company’s policies are complied with.

10. The situation of dispatchers is somewhat different from that of inspectors. While the degree of independent managerial authority of inspectors is limited, that of the dispatchers is virtually non-existent. Their function is to apply pre-arranged schedules and rules in order to make sure that the drivers, buses, routes and schedules are all properly "married", and that the required paper work is completed. The assignment of drivers – even in abnormal situations – is done in accordance with a pre-established scheme. Dispatchers receive, and record, various kinds of information and act as a conduit to management; however, these in themselves are not managerial functions. This documentation may well be an important input into the decision making process, but it is evident that the decisions are made by others. The dispatchers juggle the schedules to accomodate unplanned absences or "emergency" situations but requests for time off are generally made to management. In contrast to the inspectors, neither of the dispatchers who gave evidence considered that he had a role in "disciplining" fellow employees. Neither had sent anyone home as a disciplinary measure (although an employee who for one reason or another is not immediately available at the start of his shift may find that a dispatcher has designated another employee to perform his "run" – though even here the selection is from an established list.) The dispatchers do not write "tickets" or "citations" as the inspectors do. Having carefully reviewed all of the evidence, the Board is satisfied that dispatchers do not exercise managerial functions.

11. The parties submitted an agreed statement of facts concerning the functions of garage foremen. That statement is as follows:

"The Garage foreman is responsible for the daily assignment work to the mechanics, servicemen and plant maintenance personnel, a complement of some 31 persons.

In the absence of the Plant Superintendent, whether for a few minutes, a day or an extended absence (vacation 6 weeks), the Garage foreman is in complete charge of the area over which the Plant Superintendent normally has jurisdiction.

The Garage foreman monitors all work which he has assigned; and has authority to take disciplinary action under section 15.02 and 15.03.

The Garage foreman has from time to time and as the occasion required taken what in their view constituted appropriate disciplinary action."

In addition, the parties agreed that the disciplinary function has been limited to sending a person home for the balance of the day, with or without a recommendation to his supervisor for further steps; and the garage foreman cannot hire or fire himself. In his capacity of "acting superintendent" he may, if called upon to do so, participate in the interviewing/hiring process, i.e., the preliminary selection process.

12. Having regard to the agreed statement of facts, the Board is satisfied that the garage foreman exercises managerial functions.

13. Counsel for the respondent candidly admitted that there was evidence from which the Board could infer that the inspectors and garage foreman exercise managerial

functions; however, he argued that, having regard to their long-standing inclusion in the collective agreement, we should not do so. Counsel argued that the respondent had included the disputed classifications in the bargaining unit for more than 15 years, and should be estopped from now claiming that these employees are managerial. There is considerable merit in this argument. Where, over an extended period of time, an employee has been included in a bargaining unit and has not been treated as "managerial", there is a natural inference that he has not been exercising managerial functions and is, therefore, an "employee" within the meaning of the Act. An evidentiary onus rests upon any party who seeks to establish the contrary. Generally, the Board will require evidence of a change in duties and responsibilities before the Board will alter the previously agreed upon status quo. At the same time, the Board recognizes that section 95 relief is not restricted to situations in which parties are negotiating their first collective agreement. Organizations and systems of management can change. Over time the degree and focus of decision making power can be altered. Authority, once decentralized and diffused, can be consolidated.

14. The Board has already noted the factors which prompted the respondent to reconsider its structure, introduce technological innovations and enhance the role of inspectors – its "first line management." In view of the necessary interdependence of all elements in the respondent's transit operation, it was particularly difficult to determine where the line should be drawn, however, having assessed the evidence and determined that the inspectors and garage foreman do exercise managerial functions, the Board is satisfied that it should so declare. The parties are currently negotiating with a view to concluding a new collective agreement, and the applicant has therefore satisfied the statutory requirements of section 95. There has also, in our view, been a sufficient change in the functions exercised by inspectors as to satisfy the Board that the persons who presently occupy the classification exercise managerial authority. In all the circumstances, therefore, the Board declares that, in its opinion, the inspectors and garage foreman exercise managerial functions within the meaning of section 1(3)(b) of the Act.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING FEBRUARY 1979

BARGAINING AGENTS CERTIFIED DURING FEBRUARY

No Vote Conducted

1189-78-R: Ontario Taxi Association (Applicant) v. Glen Taxi (Respondent).

Unit: "all employees of the respondent in the Town of Halton Hills engaged as drivers or dispatchers save and except foremen, persons above the rank of foreman and office staff." (12 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note* – see Report of full decision [1979] OLRB Rep. February).

1213-78-R: Labourers' International Union of North America, Local Union 183 (Applicant) v. G. W. Barr Construction and Engineering Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman." (15 employees in the unit).

1336-78-R: United Brotherhood of Carpenters and Joiners of America (Applicant) v. Barkman Builders (Respondent).

Unit: "all carpenters, carpenters' apprentices and construction labourers employed by the respondent in the District of Kenora, including the Patricia Portion, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit). (*Having regard to the foregoing*).

1351-78-R: Ontario Public Service Employees Union (Applicant) v. The Childrens Aid Society of the City of London and the County of Middlesex (Respondent).

Unit: "all employees of the Family and Children's Services of the City of London and the County of Middlesex save and except Supervisors, persons above the rank of Supervisor, students employed during school vacation periods, persons regularly employed for not more than 24 hours per week, and the persons covered by the subsisting collective agreement." (employees in the unit).

1486-78-R: Office and Professional Employees International Union (Applicant) v. Lake Superior Board of Education (Respondent) v. Group of Employees (Objectors).

Unit: "all school office clerical and technical employees of the respondent employed by the respondent (North shore of Lake Superior covering approximately the area between Manitouwadge and Schreiber), save and except Junior Accountant, Executive Secretary, supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and persons covered by existing collective agreements binding upon the respondent." (21 employees in the unit). (*In conformity with the agreement of the parties*).

1502-78-R: Hotel and Restaurant Employees and Bartenders' International Union, Restaurant, Cafeteria and Tavern Employees Union, Local 254 (Applicant) v. Japamco Company Limited (Respondent).

Unit #1: "all employees of the respondent at Fuji Japanese Restaurant at 769 Yonge Street, Metropolitan Toronto, save and except manager, persons above the rank of manager, office staff, and persons regularly employed for not more than 24 hours per week." (4 employees in the unit).

Unit #2: "all employees of the respondent at Fuji Japanese Restaurant at 769 Yonge Street, Metropolitan Toronto regularly employed for not more than 24 hours per week, save and except manager, persons above the rank of manager, and office staff." (13 employees in the unit).

1511-78-R: Ontario Nurses' Association (Applicant) v. Sheridan Villa Home for the Aged, Regional Municipality of Peel (Respondent).

Unit #1: "all registered and graduate nurses employed by the respondent in a nursing capacity at Sheridan Villa, Mississauga, save and except the Director of Nursing, persons above the rank of Director of Nursing and persons regularly employed for not more than 24 hours per week." (8 employees in the unit). (*Having regard to the agreement of the parties*).

Unit 2: "all registered and graduate nurses regularly employed for not more than 24 hours per week by the respondent in a nursing capacity at Sheridan Villa, Mississauga, save and except the Director of Nursing and persons above the rank of Director of Nursing." (11 employees in the unit).

1519-78-R: Labourers' International Union of North America, Local 837 (Applicant) v. Neath & Associates Limited (Respondent) v. Christian Labour Association of Canada, Local #150 (Intervener).

Unit: "all cement masons and cement masons' apprentices in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit). (*Having regard to the agreement of the parties*).

1567-78-R: United Steelworkers of America (Applicant) v. Cleveland-Cae Metal Abrasive Limited (Respondent) v. Helen Wernham plus two (2) other employees (Interveners).

Unit: "all office, clerical and technical employees of the respondent at Welland, save and except supervisors, persons above the rank of supervisor, secretary to the general manager and employees now covered by a subsisting collective agreement." (7 employees in the unit).

1613-78-R: Labourers' International Union of North America, Local 837 (Applicant) v. V. Trigiani Contracting Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all plasterers, plasterers' apprentices and construction labourers in the employ of the respondent in the County of Wentworth including part of Township of North Dumfries annexed from Beverly Township and the Township of Nassagaweya and the Town of Burlington in the County of Halton, save and except non-working foremen and persons above the rank of non-working foreman." (9 employees in the unit). (*clarity note* – see Report of full decision [1979] OLRB Rep. February).

1679-78-R: Canadian Union of Restaurants & Related Employees (Applicant) v. Foodcorp Limited, carrying on business as Swiss Chalet Bar B.Q. (Respondent).

Unit: "all waitresses, waiters, busboys, kitchen staff and cashiers employed by the respondent at 2955

Bloor Street West in Metropolitan Toronto, save and except hostesses and persons above the rank of hostess." (64 employees in the unit). (*Having regard to the agreement of the parties*).

1703-78-R: Amalgamated Meat Cutters and Butcher Workmen of North America, A.F.L.-C.I.O.-C.I.O. (Applicant) v. Sunny Orange Canada (1966) Ltd. (Respondent).

Unit: "all employees of the respondent at its plant in Toronto save and except foremen, persons above the rank of foreman, chief shipper, office staff, laboratory staff, sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (37 employees in the unit).

1726-78-R: United Steelworkers of America (Applicant) v. Elva Jones (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Iroquois Falls Secondary School, save and except Manager and persons above the rank of Manager, Office and Sales Staff, and students employed during the school vacation period." (10 employees in the unit).

1734-78-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local 91, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. M. Loeb Limited Cash & Carry (Respondent).

Unit: "all employees of the respondent's Cash and Carry located in Cornwall, save and except managers, persons above the rank of manager, office and sales staff and students employed during the school vacation period." (6 employees in the unit). (*Having regard to the agreement of the parties*).

1740-78-R: Retail Clerks Union, Local 409 (Applicant) v. Lakeland Dairy, Division of Beatrice Foods (Ontario) Ltd. (Respondent) v. Employee (Objector).

Unit: "all employees of the respondent working at or out of Kenora, save and except supervisors, persons above the rank of supervisor and office staff." (7 employees in the unit). (*Having regard to the agreement of the parties*).

1744-78-R: Employees Association of Pepsi Cola Bottling Co./Oshawa Ltd. (Applicant) v. Pepsi-Cola (Canada) Ltd. (Respondent).

Unit: "all employees of the respondent located at Whitby, save and except foremen, persons above the rank of foreman, office staff and stores merchandiser, and students employed during the summer vacation period." (14 employees in the unit). (*Having regard to the agreement of the parties*).

1746-78-R: Labourers' International Union of North America, Local 183 (Applicant) v. Ideal Greenpark Homes (Respondent).

Unit: "all construction labourers employed by the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, in the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario on residential construction, save and except construction labourers employed as helpers of bricklayers and plasterers, salaried repairmen, non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit). (*Having regard to the agreement of the parties*).

1747-78-R: United Steelworkers of America (Applicant) v. Fotomat Canada Limited (Respondent).

Unit: "all employees of the respondent at 1527 Warden Avenue, Scarborough, save and except foremen, persons above the rank of foreman, office and sales staff." (15 employees in the unit).

1753-78-R: United Steelworkers of America (Applicant) v. Neo Industries Limited (Respondent).

Unit: "all employees at Seaman & Dewitt Streets in Stoney Creek, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students hired for the school vacation period." (16 employees in the unit). (*Having regard to the agreement of the parties*).

1760-78-R: United Cement, Lime and Gypsum Workers International Union (Applicant) v. St. Marys Cement Company (Respondent).

Unit: "all employees of the respondent at its plant in Bowmanville, save and except foremen, persons above the rank of foreman, office, sales and technical staff and students employed during the school vacation periods." (90 employees in the unit).

1761-78-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the County of Prince Edward (Respondent).

Unit: "all employees of the respondent in its Roads Department, save and except non-working foreman, persons above the rank of non-working foreman, office staff and engineering staff." (22 employees in the unit).

1766-78-R: Amalgamated Meat Cutters and Butcher Workmen of North America, A.F.L., C.I.O., C.L.C. (Applicant) v. Empress Foods Ltd. (Respondent).

Unit: "all office employees of the respondent at Ruthven, save and except plant manager, persons above the rank of plant manager, field inspectors, persons regularly employed for not more than 24 hours per week and employees covered by a subsisting collective agreement." (3 employees in the unit).

1769-78-R: Christian Trade Unions of Canada (Local 6) (Applicant) v. Per-fec-tion Insulations Ltd. (Respondent).

Unit: "all insulation mechanics and insulation mechanics' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (employees in the unit).

1773-78-R: United Brotherhood of Carpenters & Joiners of America, Local 18 (Applicant) v. Ross Johnstone Ltd. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Wentworth including part of Township of North Dumfries annexed from Beverly Township and the Township of Nassagaweya and the Town of Burlington in the County of Halton, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

1777-78-R: Christian Labour Association of Canada (Applicant) v. V & W Insulation Limited (Respondent).

Unit: "all insulation mechanics and insulation mechanics' apprentices in the employ of the respondent in the Regional Municipality of Waterloo except part of Beverly Township annexed by North Dumfries Township, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

1779-78-R: Graphic Arts International Union, Local 12-L (Applicant) v. Colour Separations of Canada Limited (Respondent).

Unit: "all lithographers, their apprentices and helpers in the employ of the respondent at Metropolitan Toronto, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in the unit).

1805-78-R: Labourers' International Union of North America Local 1267 (Applicant) v. Econo Disposal Systems Ltd. (Respondent).

Unit: "all employees of the respondent employed at or working out of the City of North Bay, save and except foremen, persons above the rank of foreman, persons regularly employed for not more than twenty-four hours per week and office staff." (7 employees in the unit). (*Having regard to the agreement of the parties*).

1806-78-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W. (Applicant) v. Calvert of Canada Limited (Respondent) v. Local 772, International Union of Operating Engineers (Intervener).

Unit: "all employees of the respondent at Amherstburg, save and except superintendents, persons above the rank of superintendent, office and sales staff, and persons covered by existing collective agreements between the respondent and the International Union of Operating Engineers, Local 772 and between the respondent and the Distillery, Rectifying, Wine and Allied Workers' International Union of America, Local 156." (268 employees in the unit). (*Having regard to the representations of the parties*). (*clarity note* – see Report of full decision [1979] OLRB Rep. February).

1808-78-R: London Ambulance Attendants' Association Local 3 for Tecumseh and Leamington District (Applicant) v. Sun Parlour Emergency Services Incorporated (Respondent).

Unit: "all employees of the respondent who are regularly employed for not more than twenty-four hours per week and students employed during the school vacation period in the Tecumseh and Leamington District, save and except supervisors, persons above the rank of supervisor and office staff." (13 employees in the unit).

1813-78-R: Service Employees Union, Local 478 (Applicant) v. St. Joseph's General Hospital (Respondent) v. International Union of Operating Engineers Local 796 (Intervener).

Unit: "all employees of the respondent in Elliot Lake, Ontario regularly employed for not more than twenty-four hours per week and students employed during the school vacation period save and except supervisors, persons above the rank of supervisor, professional medical staff, graduate and undergraduate nurses, graduate and student dietitians, graduate and undergraduate pharmacists, technical personnel, office and clerical staff and persons covered by subsisting collective agreements." (48 employees in the unit). (*Having regard to the agreement of the parties*).

1815-78-R: Toronto Typographical Union No. 91 (I.T.U.) (Applicant) v. Swift-o-type Limited (Respondent).

Unit: "all employees of the respondent engaged in composing room work in Metropolitan Toronto, save and except non-working foremen and persons above the rank of non-working foreman." (12 employees in the unit).

1824-78-R: Canadian Union of Restaurants & Related Employees (Applicant) v. Foodcorp Limited, carrying on business at Swiss Chalet Bar B.Q. (Respondent).

Unit: "all waitresses, waiters, busboys, kitchen staff, and cashiers employed by the respondent at 234 Bloor Street West in the City of Toronto in the Municipality of Metropolitan Toronto, save and except hostesses and persons above the rank of hostess." (47 employees in the unit). (*Having regard to the agreement of the parties*).

1825-78-R: Canadian Union of Restaurants & Related Employees (Applicant) v. Foodcorp Limited, carrying on business as Swiss Chalet Bar B.Q. (Respondent).

Unit: "all waitresses, waiters, busboys, kitchen staff, and cashiers employed by the respondent at 1225 Dundas Street East in the City of Mississauga in the Regional Municipality of Peel, save and except hostesses and persons above the rank of hostess." (53 employees in the unit). (*Having regard to the agreement of the parties*).

1836-78-R: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. National Grocers Company Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at its cash and carry depots in Metropolitan Toronto, save and except managers, persons above the rank of manager, office and sales staff, persons who are regularly employed for not more than twenty-four hours per week, students employed during the school vacation period and employees covered by subsisting collective agreements between the applicant and the respondent." (15 employees in the unit). (*Having regard to the agreement of the parties*).

1847-78-R: International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC (Applicant) v. Canadian Appliance Manufacturing Company Limited (Respondent).

Unit: "all employees of the respondent engaged in and out of the respondent's Ottawa branch, save and except foremen, those above the rank of foreman, office and clerical staff." (38 employees in the unit). (*Having regard to the agreement of the parties*).

1850-78-R: Fur & Leather Workers Union, of the Amalgamated Meat Cutters & Butcher Workmen of North America Local 68 (Applicant) v. Monarch – Mc Laren (Respondent).

Unit: "all employees of the employer in Metropolitan Toronto, Ontario save and except supervisors, foremen, persons above the rank of supervisor or foreman, office and clerical staff, sales representatives and persons regularly employed for not more than 24 hours per week." (14 employees in the unit). (*Having regard to the agreement of the parties*).

1854-78-R: United Brotherhood of Carpenters & Joiners of America Local #494 (Applicant) v. Windsor Painting Contractors Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

Applications Certified Subsequent to Pre-Hearing Vote

1970-77-R: Labourers' International Union of North America, Local 506 (Applicant) v. Duron Ontario Limited (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener #2).

Unit: "all journeymen waterproofers, apprentice waterproofers, improvers and journeymen trainees in the employ of the respondent in the Province of Ontario, but not the Counties of Peterborough, Northumberland, Hastings, Lennox and Addington, Leeds, Frontenac, Grenville, Dundas, Stormont, Glengarry, Prescott, Russell, Lanark, Renfrew, Prince Edward and the Regional Municipality of Ottawa and Carleton, save and except non-working foremen and persons above the rank of non-working foremen." (20 employees in the unit).

Number of names of persons on list as originally prepared by employer		11
Number of persons who cast ballots	7	
Number of ballots marked in favour of applicant	6	
Number of ballots marked in favour of intervener #2	1	

1407-78-R: Canadian Union of Public Employees (Applicant) v. Toronto Public Library Board (Respondent).

Unit: "all employees of the respondent in the City of Toronto regularly employed for not more than 24 hours per week, save and except those above the rank of Area Librarian, Administrative Assistant and Principal and Intermediate Clerical Assistants in Personnel Office, Confidential Secretary to the Chief Librarian, the Confidential Secretary to the Board, Principal Clerical Assistant in the Chief Librarian's Office and persons covered by subsisting collective agreements." (336 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		300
Number of persons who cast ballots	144	
Ballots segregated and not counted	1	
Number of ballots marked in favour of applicant	110	
Number of ballots marked against applicant	33	

1499-78-R: The Independent Gas Workers Union (Applicant) v. The Consumers' Gas Company (Respondent) v. International Chemical Workers' Union, and its Local 513 (Intervener).

Unit: "all office, clerical, sales and laboratory employees in the Metropolitan Toronto area, and the Districts of East Central, West Central, North Central, and Georgian Bay, save and except: supervisors, industrial sales representatives, full-time private secretaries to department managers and those above this rank, personnel department, budget department and persons who normally work 24 hours per week or less." (589 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		590
Number of persons who cast ballots	495	
Ballots segregated and not counted	3	
Number of ballots marked in favour of applicant	481	
Number of ballots marked in favour of intervener	11	

1554-78-R: Christian Labour Association of Canada (Applicant) v. Chateau Gardens (Niagara) Inc. (Respondent) v. Service Employees Union, Local 204, A.F.L.-C.I.O.-C.L.C. (Intervener).

Voting Constituency #2: "All employees of the respondent in its nursing home in Niagara-on-the-Lake regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except professional nursing staff, physiotherapists, occupational therapists, supervisors, foremen, persons above the rank of supervisor or foreman and office staff." (30 employees).

Number of names of persons on revised voters' list	36
Number of persons who cast ballots	24
Number of ballots marked in favour of Christian Labour Association of Canada	7
Number of ballots marked in favour of no union	2
Number of ballots marked in favour of Service Employees Union, Local 204, AFL-CIO-CLC	15

- and -

1558-78-R: Christian Labour Association of Canada (Applicant) v. Chateau Gardens (Niagara) Inc. (Respondent) v. Service Emuloyees Union, Local 204, A.F.L.-C.I.O.-C.L.C. (Intervener).

Voting Constituency #1: "All employees of the respondent in its nursing home in Niagara-on-the-Lake save and except professional nursing staff, physiotherapists, occupational therapists, supervisors, foremen, persons above the rank of supervisor or foreman, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (28 employees).

Number of names of persons on revised voters' list	27
Number of persons who cast ballots	25
Number of ballots marked in favour of Christian Labour Association of Canada	2
Number of ballots marked in favour of Service Employees Union, Local 204, AFL, CIO, CLC	23

Applications Certified Subsequent to Post-Hearing Vote

1383-78-R: Canadian Union of Public Employees (Applicant) v. Macdonnell Memorial Hospital (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at its hospital in Cornwall, Ontario, save and except office staff, medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dieticians, student dieticians, technical personnel, supervisors, foremen, persons above the rank of supervisor or foreman, chief engineer, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (163 employees in the unit).

Number of names of persons on revised voters' list	82
Number of persons who cast ballots	82
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	42
Number of ballots marked against applicant	39

1479-78-R: Service Employees International Union, Local 183, AF of L., C.I.O., C.L.C. (Applicant) v. Prince Edward County Memorial Hospital (Respondent).

Unit: "all employees of Prince Edward County Memorial Hospital at its hospital in Picton, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, technical personnel, supervisors, foremen, persons above the rank of supervisor or foreman, chief engineer and clerical personnel." (15 employees in the unit).

Number of names of persons on list as originally prepared by employer		16
Number of persons who cast ballots	12	
Ballots segregated and not counted	1	
Number of ballots marked in favour of applicant	11	

1568-78-R: United Brotherhood of Carpenters and Joiners of America (Applicant) v. Intercraft Industries of Canada, Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Mississauga, Ontario, save and except supervisors, and office and sales staff." (115 employees in the unit).

Number of names of persons on list as originally prepared by employer		131
Number of persons who cast ballots	125	
Ballots segregated and not counted	1	
Number of spoiled ballots	2	
Number of ballots marked in favour of applicant	84	
Number of ballots marked against applicant	38	

1633-78-R: Hotel and Restaurant Employee's Int'l Union, Local 756 (Applicant) v. VS Services Ltd. Food Service Management Division (Respondent) v. Retail Clerks Union, Local 206 Chartered by the Retail Clerks International Union (Intervener) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at its operations located in General Motors of Canada Limited plant 1 (axle plant), plant 2 (engine plant and foundry) and administration building, all in St. Catharines, Ontario, save and except chefs, supervisors, persons above the rank of supervisor and employees covered by a subsisting collective agreement." (31 employees in the unit).

Number of names of persons on list as originally prepared by employer		39
Number of persons who cast ballots	26	
Ballots segregated and not counted	2	
Number of ballots marked in favour of Hotel and Restaurant Employee's Int'l. Union, Local 756	2	
Number of ballots marked in favour of Retail Clerks Union, Local 206 Chartered by the Retail Clerks International Union	22	

APPLICATIONS FOR CERTIFICATION DISMISSED

No Vote Conducted

1219-78-R: Windsor Raceway Union, Local 639 affiliated with Service Employees International Union AFL-CIO-CLC (Applicant) v. Windsor Raceway Holdings Limited (Respondent) v. Hotel and Restaurant Employees Union, Local 743 (Intervener). (20 employees).

1685-78-R: Labourers' International Union of North America, Local 506 (Applicant) v. Nor-Scott Construction Limited (Respondent) v. Labourers' International Union of North America, Local 183 (Intervener). (2 employees).

1718-78-R: Labourers' International Union of North America, Local 506 (Applicant) v. Pentagon Construction Canada Inc. (Respondent). (4 employees).

1739-78-R: Union of Canadian Retail Employees, Local 1000, Chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Applicant) v. Cordesco Limited (Respondent). (27 employees).

1770-78-R: Canadian Union of Public Employees (Applicant) v. The Ontario Cancer Treatment and Research Foundation, London Clinic (Respondent).

Unit: "all registered and non-registered para-medical technologists and technicians employed by the respondent in London, Ontario, save and except supervisors, personnel above the rank of supervisor, students in training, personnel regularly employed for not more than 24 hours per week, and students employed during the school vacation period." (22 employees in the unit).

1774-78-R: Canadian Union of Operating Engineers and General Workers (Applicant) v. Belleville General Hospital (Respondent). (4 employees).

1828-78-R: Labourers' International Union of North America, Local 506 (Applicant) v. Pentagon Construction Canada Inc. (Respondent). (4 employees).

1860-78-R: Canadian Union of Public Employees (Applicant) v. Metropolitan Toronto Association for the Mentally Retarded (Respondent). (109 employees).

Certification Dismissed Subsequent to Pre-Hearing Vote

1444-78-R: Christian Labour Association of Canada (Applicant) v. The Salvation Army Grace Hospital (Respondent) v. Canadian Union of Operating Engineers and General Workers (Intervener).

Voting Constituency: "All Engineers, Mechanics, Electrical and Electronic Technicians, apprentices and helpers, employed by The Salvation Army Grace Hospital in Windsor, Ontario, save and except the Building Superintendent, The Assistant Building Superintendent, employees regularly employed less than twenty-four hours per week, and students employed during the school summer vacation and employees covered by subsisting collective agreements." (8 employees).

Number of names of persons on list as originally prepared by employer		7
Number of persons who cast ballots		6
Number of ballots marked in favour of applicant	0	
Number of ballots marked in favour of intervener	6	

1615-78-R: Printing Specialties and Paper Products Union, Local 466 (Applicant) v. Haremar Plastic Mfg. Ltd. (Respondent).

Voting Constituency: "All employees of the respondent in the Borough of North York save and except foremen, persons above the rank of foreman, office, sales, clerical and technical staff, persons employed for not more than twenty-four hours per week and students employed during the school vacation period." (27 employees).

Number of names of persons on revised voters' list		27
Number of persons who cast ballots	27	
Ballots segregated and not counted	8	
Number of ballots marked in favour of applicant	5	
Number of ballots marked against applicant	14	

1634-78-R: Eastern Canada Council of Teamsters (Applicant) v. Provost Industrial Tankers Ltd. (Respondent) v. Christian Labour Association of Canada (Intervener).

Voting Constituency: "All employees of the respondent in the Province of Ontario save and except foremen, persons above the rank of foreman, office and sales staff." (77 employees).

Number of names of persons on list as originally prepared by employer		77
Number of persons who cast ballots	60	
Ballots segregated and not counted	1	
Number of ballots marked in favour of applicant	7	
Number of ballots marked in favour of intervener	52	

Certification Dismissed Subsequent to Post-Hearing Vote

1103-78-R: Canadian Union of Operating Engineers & General Workers (Applicant) v. The Cadillac Fairview Corporation Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent employed at the Toronto-Dominion Centre, Toronto, save and except foremen, persons above the rank of foreman, office and clerical staff, stationary engineers, cleaners, security guards and students employed during the school vacation period." (57 employees in the unit).

Number of names of persons on revised voters' list		54
Number of persons who cast ballots	54	
Number of ballots marked in favour of applicant	26	
Number of ballots marked against applicant	28	

1165-78-R: Teamsters Local 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Greb Industries Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all warehouse employees of the respondent in the Regional Municipality of Waterloo, save and except supervisors, persons above the rank of supervisor, office and sales staff and persons regularly employed for not more than twenty-four hours per week." (74 employees in the unit).

Number of names of persons on revised voters' list		70
Number of persons who cast ballots	66	
Ballots segregated and not counted	3	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	25	
Number of ballots marked against applicant	37	

1269-78-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. Sun Pac Foods Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Metropolitan Toronto, save and except foremen, persons above the rank of foreman, sales staff and office staff." (52 employees in the unit).

Number of names of persons on list as originally prepared by employer		38
Number of persons who cast ballots		36
Number of spoiled ballots	2	
Number of ballots marked in favour of applicant	2	
Number of ballots marked against applicant	32	

1515-78-R: International Association of Machinists and Aerospace Workers (Applicant) v. Old Sport Express Limited c.o.b. as Comet Express Lines (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Scarborough, Ontario save and except office staff, sales staff, supervisors (including dispatcher), persons above the rank of supervisor and students employed during the school vacation period." (32 employees in the unit).

Number of names of persons on revised voters' list		17
Number of persons who cast ballots		17
Number of ballots marked in favour of applicant	4	
Number of ballots marked against applicant	13	

1664-78-R: Hotel, Restaurant and Bartenders Employees Union, Local 442 (Applicant) v. Niagara International Centre Ltd. (Respondent).

Unit: "all employees of the respondent working at the Skylon Tower, Niagara Falls, save and except supervisors, persons above the rank of supervisor, office, sales and accounting staff, Maitre d', hostess, and persons regularly employed for not more than 24 hours per week." (247 employees in the unit).

Number of names of persons on revised voters' list		66
Number of persons who cast ballots		69
Ballots segregated and not counted	4	
Number of ballots marked in favour of applicant	6	
Number of ballots marked against applicant	59	

APPLICATIONS FOR CERTIFICATION WITHDRAWN

1748-78-R: Service Employees Union Local 204 Affiliated with A.F.L. C.I.O. C.L.C. (Applicant) v. Leisure World Nursing Home (Respondent). (50 employees).

1751-78-R: International Union of Operating Engineers, Local 793 (Applicant) v. Blue-Con Construction Inc. (Respondent). (2 employees).

1763-78-R: Service Employees Union, Local 478 (Applicant) v. Leisure World Nursing Homes, Limited (Respondent). (18 employees).

1765-78-R: Retail Clerks Union, Local 206, chartered by Retail Clerks International Union (Applicant) v. Fine Papers London (Respondent) v. Group of Employees (Objectors). (11 employees).

1798-78-R: The International Brotherhood of Painters and Allied Trades, Local 1919 (Applicant) v. C. H. Heist Industrial Services Ltd. (Respondent). (8 employees).

1843-78-R: Hotels, Clubs, Restaurants, Tavern, Employees' Union Local 261 (Applicant) v. Le Vieux Chateau (Respondent). (26 employees).

APPLICATIONS UNDER SECTION 1(4)

0969-78-R: United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. M. P. Lundy Construction Limited and G. Lundy and Associates Limited (Respondents). (*Dismissed*).

1439-78-R: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46 (Applicant) v. English & Mould Ltd. and Argus Refrigeration & Air-Conditioning Limited (Respondents). (*Granted*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1346-78-R: Joseph Perreault (Applicant) v. Teamsters, Chauffeurs, Warehousemen & Helpers Local Union No. 91 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Respondent). (*Granted*).

Unit: "all employees of Coinamatic (Eastern) Limited working in Ottawa in the Regional Municipality of Ottawa-Carleton, save and except foremen, those above the rank of foreman, office and sales staff." (6 employees in the unit).

Number of names of persons on list as originally prepared by employer		6
Number of persons who cast ballots		6
Number of ballots marked in favour of Respondent	1	
Number of ballots marked against Respondent	5	

1369-78-R: Brian Brown (Applicant) v. Teamsters Local Union #419 (Respondent) v. Zurn Drainage and Control Systems Ltd. (Intervener). (*Terminated*).

Unit: "all employees of the intervener employed at 1873 Wilson Avenue in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff." (5 employees in the unit).

Number of names of persons on list as originally prepared by employer		7
Number of ballots marked who cast ballots		5
Number of ballots marked against the respondent	5	

1468-78-R: The Employees of Royce Enterprises (Applicant) v. The United Steel Workers of America (Respondent). (*Granted*).

Unit: "all employees of Royce Enterprises, 1 Royce Avenue, Orillia, save and except foremen, per-

sons above the rank of foreman and persons regularly employed for not more than 24 hours per week." (20 employees in the unit).

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	15
Number of spoiled ballots	1
Number of ballots marked against Respondent	14

1488-78-R: Don Hemmelskamp (Applicant) v. Christian Labour Association of Canada (Respondent). (19 employees). (*Dismissed*).

1501-78-R: Richard B. Mathe (Applicant) v. Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Respondent) v. W. G. McMahon Ltd. (Intervener). (*Granted*).

Unit: "all employees of the intervener employed at and/or out of Mississauga, save and except supervisors and persons above the rank of supervisors, office and sales staff, and students employed during the school vacation period." (6 employees in the unit).

Number of names of persons on list as originally prepared by employer	6
Number of persons who cast ballots	5
Number of ballots marked in favour of Respondent	0
Number of ballots marked against Respondent	5

1508-78-R: A Mosher (Applicant) v. Office & Professional Employees International Union Local 81 (Respondent). (2 employees). (*Granted*).

1520-78-R: Joseph Beneteau and Thomas Marshall (Applicants) v. The Distillery, Rectifying, Wine and Allied Workers' International Union of America, A.F. of L., C.I.O., C.L.C., on behalf of its affiliated Local Union 73 (Respondent) v. Calvert of Canada Limited (Intervener). (*Granted*).

Unit: "all employees of Calvert of Canada Limited at its Amherstburg, Ontario, plant save and except managers, superintendents, department heads, supervisors, non-working foreman, chemists (those who generally perform work requiring a degree of science), general administrative office employees other than those in designated clerical functions at Amherstburg, all other employees possessing full authority to hire and discharge employees, and excluding such employees as are covered by existing agreements between Calvert of Canada Limited and other Unions affiliated with the A.F. of L., C.I.O., C.L.C." (334 employees in the unit).

Number of names of persons on revised voters' list	339
Number of ballots who cast ballots	276
Number of ballots marked in favour of Respondent	15
Number of ballots marked against the Respondent	261

1529-78-R: Norman Godinho (Applicant) v. Amalgamated Clothing and Textile Workers, Toronto Joint Board (Respondent) v. Dylex Limited (Intervener). (*Granted*).

Unit: "all employees of Dylex Limited in its central distribution and warehousing division in Metropolitan Toronto, save and except foremen, foreladies, persons above the rank of foreman and forelady, group supervisor, office and sales staff, students employed during the school vacation period and persons regularly employed for not more than 24 hours per week." (166 employees in the unit).

Number of names of persons on revised voters' list	167
Number of persons who cast ballots	158
Number of spoiled ballots	1
Number of ballots marked in favour of Respondent	16
Number of ballots marked against Respondent	141

1583-78-R: Donald McCubbin (Applicant) v. Canadian Chemical Workers' Union Local 34 (Respondent). (*Granted*).

Unit: "all employees of Unicorn Abrasives of Canada Limited at Brockville, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (59 employees in the unit).

Number of names of persons on list as originally prepared by employer	59
Number of persons who cast ballots	54
Ballots segregated and not counted	1
Number of ballots marked in favour of Respondent	25
Number of ballots marked against Respondent	28

1624-78-R: John McIntyre Sr. Marvin Harris Cohen (Applicants) v. Canadian Food and Allied Workers Local Union 633, Chartered by The Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Respondent) v. Donny's Meats (Bathurst) Limited (Intervener). (2 employees). (*Dismissed*).

1645-78-R: Lax Iron & Steel Limited (*Applicant*) v. Teamsters Local 879 Affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Respondent). (employees). (*Withdrawn*).

1729-78-R: Walter Brown (Applicant) v. United Steelworkers of America (Respondent) v. DoAll Canada Ltd. (Intervener). (17 employees). (*Dismissed*).

APPLICATIONS FOR DECLARATION OF SUCCESSOR STATUS

1402-78-R: Canadian Union of Public Employees and its Local 115 and 2035 (Applicant) v. The Corporation of the City of Brockville (Respondent). (*Granted*).

1758-78-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Workers, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Margaret's Fine Foods Limited (Respondent). (*Granted*).

1759-78-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Workers, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Margaret's Fine foods Limited (Respondent). (*Granted*).

APPLICATIONS FOR DECLARATION THAT STRIKE UNLAWFUL

1784-78-U: Rockwell International of Canada Ltd. (Applicant) v. International Union United Automobile, Aerospace, Agricultural Implement Workers of America, Local 1067, Kenneth E. Bilton, Arthur D. Bryant, Robert D. Nelson and Those Persons Named in Schedule "A" (Respondents). (*Granted*).

1817-78-U; Windsor Raceway Holdings Limited (Applicant) v. Robert Bondy, Dorothy Prokopchuk et al (Respondents). (*Withdrawn*).

1818-78-U: Windsor Raceway Holdings Limited (Applicant) v. Robert Bondy, Dorothy Prokopchuk et al (Respondents). (*Withdrawn*).

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1762-78-U: United Brotherhood of Carpenters and Joiners of America (Applicant) v. Hida Industries Incorporated (Respondent). (*Withdrawn*).

1819-78-U: Windsor Raceway Holdings Limited (Applicant) v. Robert Bondy, Dorothy Prokopchuk et al (Respondents). (*Withdrawn*).

1831-78-U: Ontario Nurses' Association (Applicant) v. Belleville General Hospital (Respondent). (*Withdrawn*).

1832-78-U: Windsor Raceway Holdings Limited (Applicant) v. Windsor Raceway Union, Local 639 Service Employees International Union, Walter Adamus, Lyman Allen et al (Respondents). (*Withdrawn*).

COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

0566-78-U: Frederick Carl Vincent (Complainant) v. United Steelworkers of America and Walker Exhausts Limited (Respondents). (*Dismissed*).

1044-78-U: James Mason, personally, and on behalf of those parties listed in Exhibit "A" attached hereto (Complainant) v. The Canadian Union of Public Employees, Local 87 (Respondent). (*Dismissed*).

1446-78-U: Service Employees Union, Local 210, Affiliated with Service Employees International Union, AFL-CIO-CLC (Complainant) v. Barnes Rest Home (Respondent). (*Dismissed*).

1459-78-U: International Molders' and Allied Workers' Union (Complainant) v. Riverdale Frozen Foods Limited (Respondent). (*Withdrawn*).

1460-78-U: Soft Drink Workers Joint Local Executive Board (Complainant) v. Kitchener Beverages Limited (Respondent). (*Dismissed*).

1563-78-U: International Association of Machinists and Aerospace Workers (Complainant) v. Comet Express/Oldsport Express (Respondent). (*Dismissed*).

1606-78-U: Hotels, Clubs, Restaurants, Tavern Employees' Union, Local 261 (Complainant) v. Sky-line Hotels Limited (Respondent). (*Withdrawn*).

1623-78-R: United Steelworkers of America (Complainant) v. Cleveland-Cae Metal Abrasive Limited (Respondent). (*Withdrawn*).

1637-78-U: Printing Specialties and Paper Products Union, Local 466 (Complainant) v. Haremar Plastic Manufacturing Limited (Respondent). (*Withdrawn*).

1668-78-U: Pharmacists and Professional Employees Association, Local 1976, Chartered by the Retail Clerks International Union CLC, AFL-CIO (Complainant) v. Cedarcrest Nursing Home Ltd. (Respondent). (*Withdrawn*).

1675-78-U: Amalgamated Meat Cutters & Butcher Workmen of North America (Complainant) v. Mayple Lyn Foods (Respondent). (*Withdrawn*).

1700-78-U: Pharmacists and Professional Employees Association, Local 1976, Chartered by the Retail Clerks International Union, CLC, AFL-CLC (Complainant) v. Cedarcrest Nursing Home Ltd., and Dr. Linkohv (Respondents). (*Withdrawn*).

1708-78-U: John Vanderlinde (Complainant) v. Reid Aggregates Limited (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener). (*Dismissed*).

1710-78-U: United Brotherhood of Carpenters and Joiners of America (Complainant) v. Titan Wood Products Limited (Respondent). (*Withdrawn*).

1712-78-U: Amalgamated Meat Cutters and Butcher Workmen of North America, A.F.L. - C.I.O. - C.L.C. (Complainant) v. Levine Bros. Hides (Ontario) Ltd. (Respondent). (*Dismissed*).

1714-78-U: International Beverages Dispensers' and Bartenders' Union Local 280 of the Hotel and Restaurant Employees and Bartenders' International Union, A.F.L. - C.I.O. - C.L.C. (Complainant) v. Danforth Hotel (Respondent). (*Withdrawn*).

1719-78-U: United Brotherhood of Carpenters and Joiners of America Local Union 93 (Complainant) v. Canac Kitchens Ltd. (Respondent). (*Withdrawn*).

1783-78-U: United Electrical, Radio & Machine Workers of America (UE) and its Local 518 (Complainant) v. Pre Fab Cushioning Products Limited and Vitafoam Products Canada Limited (Respondent). (*Withdrawn*).

1796-78-U: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, U.A.W. (Complainant) v. Sterling Varnish Company (Canada) Ltd. (Respondent). (*Withdrawn*).

1811-78-U: Jacques Pitre (Complainant) v. Local 1036 (Jimme Lewis) Northland District (Respondent). (*Withdrawn*).

1821-78-U: Hotel & Restaurant Employees & Bartenders Union, Local 604 of the Hotel & Restaurant Employees & Bartenders International Union, A.F.L., C.I.O., C.L.C. (Complainant) v. The Empress Hotel (Respondent). (*Withdrawn*).

1822-78-U: International Beverage Dispensers' and Bartenders' Union Local 280 of the Hotel and Restaurant Employees and Bartenders International Union AFL CIO C.L.C. (Complainant) v. Park Plaza Hotel (Respondent). (*Withdrawn*).

1823-78-U: International Beverage Dispensers' and Bartenders' Union Local 280 of the Hotel and Restaurant Employees and Bartenders International Union AFL-C.I.O.-CLC (Complainant) v. Queensbury Inn Enterprises Inc. Known as: Queenbury Arms (Respondent). (*Withdrawn*).

1830-78-U: Ontario Nurses' Association (Complainant) v. Belleville General Hospital (Respondent). (*Withdrawn*).

1838-78-U: Retail Clerks Union, Local 486 (Complainant) v. Robert Michaud (78) Ltd. (Respondent). (*Withdrawn*).

1839-78-U: Retail Clerks Union, Local 486 (Complainant) v. Robert Michaud (78) Ltd. (Respondent). (*Withdrawn*).

1840-78-U: Retail Clerks Union, Local 486 (Complainant) v. Robert Michaud (78) Ltd. (Respondent). (*Withdrawn*).

1841-78-U: Pharmacists and Professional Employees Association Local 1976 (Complainant) v. Green Acres Nursing Home Ltd. (Respondent). (*Withdrawn*).

1842-78-U: Pharmacists and Professional Employees Association Local 1976 (Complainant) v. Green Acres Nursing Home Ltd. (Respondent). (*Withdrawn*).

1859-78-U: Hotels, Clubs, Restaurants, Tavern, Employees' Union, Local 261 (Complainant) v. Norman Hollyoake and the Berkeley Savoy Hotel (Respondents). (*Withdrawn*).

1864-78-U: George Christopoulos (Complainant) v. International Brotherhood of Teamsters Local 647 and Canada Bread Co. Ltd., Division of Corporate Foods Ltd. (Respondents). (*Withdrawn*).

1886-78-U: Hotel and Restaurant Employees and Bartenders' International Union, Restaurant, Cafeteria and Tavern Employees Union, Local 254 (Complainant) v. Japamco Company Limited (Respondent). (*Withdrawn*).

1893-78-U: Nicole Ranger, Mirielle Potvin (Complainant) v. Le Vieux Chateau, 797 McGill Street, Hawkesbury, Ontario (Stylianios Tsourounakis, Demostenis Dikeos, Constantin Xerakias) (Respondent). (*Withdrawn*).

1925-78-U: International Beverage Dispensers' and Bartenders' Union, Local 280 of the Hotel and Restaurant Employees and Bartenders International Union AFL CIO CLC (Complainant) v. Serug Holdings Ltd. and Sidney Eisenhan Hotels Ltd., et al in Trust Known: as the Lansdowne Tavern Ltd. (Respondent). (*Withdrawn*).

APPLICATION FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

1569-78-M: Boots Drug Stores (Canada) Limited (Employer) v. Retail, Wholesale and Department Store Union, AFL:CIO:CLC: and its Local 414 (Trade Union). (*Granted*).

APPLICATIONS UNDER SECTION 55

0968-78-R: United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. M. P. Lundy Construction Limited and G. Lundy and Associates Limited (Respondents). (*Granted*).

1301-78-R: Toronto Building and Construction Trades Council (Applicant) v. C. A. Pitts General Contractor Limited and Pitts Engineering Construction Limited (Respondents). (*Withdrawn*).

1447-78-R: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46 (Applicant) v. English & Mould Ltd. and Argus Refrigeration & Air-Conditioning Limited (Respondents). (*Dismissed*).

1522-78-R: The Construction Council of Ontario of the International Brotherhood of Electrical Workers, and The International Brotherhood of Electrical Workers, Local Union 120 (Applicants) v. Hossack & Matthews Ltd., and 390097 Ontario Ltd., carrying on business under the name and style of the Lite Gallery (Respondents). (*Withdrawn*).

1591-78-R: Division 1320, Amalgamated Transit Union (Applicant) v. City of Peterborough (Respondent) v. Canadian Union of Public Employees, Local 504 (Intervener). (*Granted*).

1676-78-R: Ottawa Steel Plate Printers, Local 6, of International Plate Printers, Dye Stampers and Engravers Union of North America (Applicant) v. British American Bank Note Company Limited, Ontario Bank Note Company Limited (Respondents). (*Dismissed*).

1727-78-R: United Brotherhood of Carpenters and Joiners of America, Local 3054 (Applicant) v. Wayne A. Assaf and Fashion Craft Kitchens Inc. (Respondent). (*Granted*).

APPLICATION FOR THE COLLEGES COLLECTIVE BARGAINING ACT 1975, UNDER SECTION 82

1487-78-M: Ontario Public Service Employees Union (Applicant) v. George Brown College of Applied Arts and Technology (Respondent). (*Withdrawn*).

APPLICATIONS FOR DETERMINATION UNDER SECTION 95(2)

0874-77-M: Sunnybrook Hospital Employees Union Local 777 (Application) v. Sunnybrook Hospital (Respondent). (*Withdrawn*).

1592-78-M: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 195 (Applicant v. National Auto Radiator Manufacturing Company Limited (Respondent). (*Withdrawn*).

1697-78-M: Office and Professional Employees International Union, AFL, CIO, CLC – Local 343 (Applicant) v. The Ontario English Catholic Teachers' Association (Respondent). (*Withdrawn*).

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1677-78-M: J. S. Mechanical (Employer) v. Local Union 800 of the United Association of Journeymen and Apprentices of the Plumbing & Pipe Fitting Industry of the United States and Canada (Trade Union). (*Dismissed*).

1678-78-M: Brant County Board of Education (Employer) v. Female Office Employees' Association (Trade Union). (*Dismissed*).

1814-78-M: The Kenora-Rainy River District Contractors Association (Employer) v. United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Trade Union). (*Terminated*).

APPLICATIONS UNDER SECTION 112A

1711-76-M: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 3227, and 3233 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. The General Contractors' Section of the Toronto Construction Association and Engineered Structures and Components (Respondents). (*Withdrawn*).

1898-77-M: Local Union 1788 of the International Brotherhood of Electrical Workers (Applicant) v. Ontario Hydro (Respondent). (*Dismissed*).

0290-78-M: Labourers' International Union of North America, Local 506 (Applicant) v. The General Contractors' Section of the Toronto Construction Association and Modern Excavators Ltd. (Respondents). (*Withdrawn*).

1109-78-M: Labourers' International Union of North America, Ontario Provincial District Council on behalf of Local 506 and Labourers' International Union of North America, Local Union 506 (Applicant) v. Modern Excavators Ltd. and The General Contractors' Section of the Ontario Construction Association (Respondents). (*Withdrawn*).

1360-78-M: The Toronto Building and Construction Trades Council, a Council of Trades Unions Acting as the Representative and Agent of Teamsters Local 230 and Labourers' International Union

of North America, Local 183 and Teamsters' Local Union No. 230, Ready Mix, Building Supply, Hydro and Construction Drivers Warehousemen and Helpers (Applicants) v. Pitts Engineering Construction Limited and C. A. Pitts General Contractor Limited (Respondents). (*Withdrawn*).

1449-78-M: The Master Insulators' Association of Ontario, Incorporated (Applicant) v. International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 and Joe Duffy (Respondents). (*Withdrawn*).

1497-78-M: Labourers' International Union of North America, Local 183 (Applicant) v. Relac Construction Ltd. (Respondent). (*Terminated*).

1587-78-M: Labourers' International Union of North America, Local 527 (Applicant) v. Joe Arban Contractor Ltd. (Respondent). (*Withdrawn*).

1605-78-M: The Construction Council of Ontario of the International Brotherhood of Electrical Workers, and The International Brotherhood of Electrical Workers, Local Union 120 (Applicants) v. The Electrical Trades Bargaining Agency, Hossack & Matthews Ltd., and 390097 Ontario Ltd., carrying on business under the name and style of the Lite Gallery (Respondents). (*Withdrawn*).

1652-78-M: Labourers International Union of North America, Local 527 (Applicant) v. Tristan Incorporated (Respondent). (*Withdrawn*).

1667-78-M: The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 221 (Applicant) v. Bechtel Canada Limited (Respondent) v. International Association of Bridge, Structural & Ornamental Ironworkers and Ontario District Council, International Association of Bridge Structural and Ornamental Ironworkers Local 765 (Intervener). (*Withdrawn*).

1720-78-M: United Brotherhood of Carpenters and Joiners of America – Local Union 93 (Applicant) v. Normand & Fleming Ltd. (Respondent). (*Withdrawn*).

1721-78-M: Labourers' International Union of North America, Local 183 (Applicant) v. Vanbots Construction Co. Ltd. (Respondent). (*Dismissed*).

1738-78-M: Labourers' International Union of North America Local 183 (Applicant) v. Roadwin Contracting Limited, et al (Respondents). (*Withdrawn*).

1820-78-M: A Council of Unions: Acting as the Representative and Agent of the International Union of Operating Engineers, Local 793 – and the Labourers International Union of North America, Local 183 (Applicant) v. Dax Properties Ltd. (Respondent). (*Withdrawn*).

1874-78-M: International Union of Operating Engineers, Local 793 (Applicant) v. Employer Bargaining Agency and Case Excavating & Grading Co. (Respondent). (*Withdrawn*).

1875-78-M: International Union of Operating Engineers, Local 793 (Applicant) v. Employer Bargaining Agency and Case Excavating & Grading Co. (Respondent). (*Withdrawn*).

1908-78-M: Labourers' International Union of North America, Local 183 (Applicant) v. Goldie-Burgess Limited (Respondent). (*Withdrawn*).



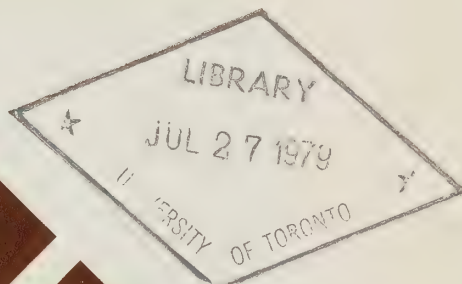
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ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
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Cited [1979] OLRB REP.

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DUKE'S HOTEL INC.; RE LOUISE MORIN; LOCAL 756, HOTEL AND RESTAURANT EMPLOYEE'S UNION 298

Timeliness – Sale of a Business – Termination – Application for termination filed within one year of the Board's declaration under section 55 – Application untimely.

FASHION CRAFT KITCHENS INC.; RE WILFRED L. WALLER; UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 3054 304

1406-78-R Canadian Union of Public Employees, (Applicant), v. **District of Algoma Home for the Aged (Algoma Manor)**, (Respondent), v. Group of Employees, (Objectors).

1278-78-U Lois Campbell, (Complainant), v. **District of Algoma Home for the Aged (Algoma Manor)**, (Respondent).

Certification – Charges – Discharge – Section 79 – Employer misconduct occurring well after the organizing drive by the Union – whether grounds for application of section 7a – Discharge for striking a patient – abuse of patient not established – failure of employer to satisfy Board that discharge not motivated by anti-union sentiment

BEFORE: M. G. Picher, Vice-Chairman, and Board Members D. B. Archer and C. G. Bourne.

APPEARANCES: *L. Kozak, Clarence Dungey and Lois Campbell for the applicant and complainant; Donald B. Laidlaw and Francis J. Hill for the respondent; Dawn Strum and Lola MacFarlane for the objectors.*

DECISION OF THE BOARD; April 27th, 1979

1. The name: “Algoma District Home for the Aged (Thessalon) Algoma Manor” appearing in the style of cause in File No. 1278-78-U and the name: “Algoma Manor Home for the Aged” appearing in the style of cause in File No. 1406-78-R are amended to read: “District of Algoma Home for the Aged (Algoma Manor)”.

2. The Board directs that the above application and complaint be and the same are hereby consolidated.

3. These matters come before the Board by way of an application for certification and a complaint under section 79 of The Labour Relations Act. The applicant seeks bargaining rights for all employees of the respondent at the Town of Thessalon, in the District of Algoma with the exception of members of management and office staff. While the applicant has not submitted sufficient membership evidence to entitle it either to outright certification or to the holding of a representation vote, it asks the Board to exercise its discretion to grant certification pursuant to section 7a of The Labour Relations Act.

4. The section 79 complaint alleges that the grievor, Mrs. Lois Campbell, was discharged on August 23, 1978 as a result of anti-union sentiment aimed at her as the principal organizer of the union among the employees in the Algoma Manor Home for the Aged. Mrs. Campbell seeks reinstatement into her job and compensation for all wages and benefits lost through her discharge. The employer submits that the sole reason for her discharge was abuse of an elderly resident of the Home.

5. The Board will deal firstly with the application for certification. Excluding regis-

tered nurses, there are eighty-three full-time employees and thirty-one part-time employees in the bargaining unit. The applicant has submitted to the Board membership documents on behalf of twenty-six of the full-time employees and two of the part-time employees. That would give the applicant membership strength of approximately thirty-one per cent among the full-time employees and six per cent among the part-time employees on the date of application. In the ordinary course that would result in a dismissal of this application.

6. The applicant maintains that it was unable to obtain greater membership support because of breaches of The Labour Relations Act committed by the employer. It submits that the employer's actions were such that the true wishes of the employees are not likely to be ascertained. It maintains that the Board should view its membership strength at the time of the hearing as adequate for the purposes of collective bargaining and certify the applicant as the bargaining agent of the employees pursuant to section 7a of The Labour Relations Act.

7. Section 7a of the Act provides as follows:

When an employer or employers' organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

8. That section is aimed at redressing the rights of employees and their trade union when an employer has committed breaches of the Act so flagrant as to inhibit the ability of the employees to freely choose whether or not they wish to be represented by a trade union. The most obvious example of a breach of that kind occurs when an employer causes employees to reasonably fear for their job security in the event that a union campaign is successful. (See: *e.g. Dylex Ltd.*, [1977] OLRB Rep. June 357, affirmed sub. nom. *Re Marques and Dylex Ltd.* (1978), 18 O.R. (2d) 58 (Div. Ct.); *Viceroy Construction Company Limited*, [1977] OLRB Rep. Sept. 562; *Lorain Products (Canada) Ltd.*, [1977] OLRB Rep. Nov. 734.)

9. The evidence establishes that the union held meetings of the employees at 1:00 p.m. and at 7:00 p.m. on Tuesday, June 6, 1978 in the community hall at Thessalon, Ontario. The purpose of the meeting was to launch an organization campaign among the employees of the Manor. Two of the registered nurses employed by the Manor attended the meeting; they subsequently received letters signed by Mr. F. J. Hill, administrator of the Home, warning them not to attend further meetings of the union and advising them that under The Ontario Labour Relations Act they are not permitted to be involved in the formation of a labour organization. The Board accepts the explanation of the employer that its position in that regard was based on a belief that the nurses exercised supervisory functions that would exclude them from the bargaining unit.

10. Within a few days of the union meetings Mr. Hill called a meeting of the employees in the auditorium of the Home. The ostensible purpose of that meeting was to discuss

terms and conditions of employment. However, when Mrs. Campbell asked specific questions about the employees' insurance benefits, Mr. Hill replied that because of the union campaign he was unable to answer any questions in that regard.

11. The Union relies on three other events in support of its request for section 7a certification. Firstly, it sought to prove that management instructed some members of the cleaning staff not to attend the union meetings. Because of certain contradictions in the evidence of Mr. Hill and of Anne Gregory, the cleaning staff supervisor, the Board is left in considerable doubt about the employer's denial of that charge.

12. Next the union relies upon the fact that a petition was circulated against the union several months later, on November 27, 1978. The petition was left on a table in the barber shop of the Home, in circumstances where management could know which employees signed it.

13. Lastly, the union relies on the discharge of Mrs. Campbell in August of 1978 as a further breach of the Act which would deprive the employees of their ability to freely express their wishes respecting the union.

14. For the purposes of the application for certification, if the Board assumes, without finding, that each of the above acts, including the instigation of the petition, constituted interference with the union by the employer contrary to the Act, the Board is nevertheless not satisfied that those breaches would be such as to deprive employees of their ability to confidentially express whether or not they wish to be represented by the union. While the open circulation of a petition shortly after the discharge of the employee who was the primary organizer of the union must cause the Board concern, the Board is satisfied, on the whole of the evidence, that those events occurred well after the union campaign had run its course. The union's campaign was effectively exhausted by the end of July and at that time any transgressions by the employer respecting the nursing staff, the cleaning staff or the assembled employees addressed by Mr. Hill were not so extreme as to cause the employees to fear for their job security and thereby be unable to support the union by confidentially signing a membership application. For the foregoing reasons the application for certification is hereby dismissed.

15. We turn now to consider the section 79 complaint of Mrs. Lois Campbell. The evidence is clear that she was the originator and chief organizer of the campaign to unionize the employees of the Manor. It is she who first obtained the name and telephone number of Mr. Clarence Dungey, the union's representative in Sault Ste. Marie. She called Mr. Dungey and arranged for him to advertise and conduct the meetings with the employees on June 6, 1978 at the Thessalon community centre. With the assistance of a small group of fellow-employees she promoted the meeting among the employees in the work place. At the union meeting she sat apart from the general group of employees and was seen by everyone present to be in a close working relationship with Mr. Dungey. In the weeks immediately following the meeting Mrs. Campbell actively promoted the union among the employees and personally distributed a number of membership applications. It is clear that she was known throughout the Home as being responsible for the union's organizing campaign.

16. Mrs. Campbell has worked in the Manor as a nurses' aide since April of 1975. The evidence establishes that from that time until the date of her discharge in August of

1978 she was a good employee with virtually no disciplinary record. It appears that she received verbal corrections from her employer on only two occasions during that period. On April 13, 1978 she arrived at work in clothing that did not conform to the uniform requirements for nurses' aides. She was then required to put on a gown provided by the Manor and did so. On May 10, 1978 she was observed in an area outside her work assignment and was instructed to return to her work area. Neither of these two occurrences were serious enough to warrant a written warning. In fact, there is little or no conflict in the evidence respecting Mrs. Campbell's abilities and performance as an employee. She was a good employee who took her work seriously.

17. At the time of her discharge her work involved caring for some of the most difficult residents in a part of the home known as the Female Special Care Unit. It is there that female residents are kept who require the closest attention. Some of them are completely bedridden, others need to be physically restrained for their own protection when lying or sitting. Some residents in the Female Special Care Unit have a limited ability to get around and need assistance in walking. Some are incontinent. Almost all of the residents in that unit are unable to feed, wash or dress themselves. Whether through physical problems, such as the effects of a stroke, or through advanced senility, a number of the female special care residents have a limited ability to reason and/or to communicate. Because of their special circumstances they are the residents most in need of care and most difficult to care for.

18. It is common ground that the residents in the Special Care Unit are prone to occasional outbursts against members of the staff during the performance of their work. It is not unusual for a resident to refuse to cooperate in being washed, dressed or moved. For example, the Board heard evidence that one resident will refuse to part with her purse; others will strenuously resist being undressed and made ready for bed; some will react violently to being washed when they do not wish to be. These are understandable reactions that are sometimes overcome by the use of persuasion. Sometimes, however, the resistance of a resident to some aspect of essential care is so extreme as to require a measured amount of physical force by one or more of the attendants. It is not uncommon that one attendant may have to hold a resident while another changes her clothing or that two attendants may have difficulty transferring a resident from her bed when the resident is either unable or unwilling to be moved. Usually the staff come to know the kinds of difficulties to expect with certain residents and develop appropriate routines to deal with them. While it is obviously impossible in every case to please residents or placate them in a demand that is irrational, it is essential in every case that their hygiene and physical well-being be assured as a matter of first priority.

19. Because of the fragile constitution of the elderly any institution charged with their care must have a particular concern with any cut, bruise or other injury sustained by a resident. A bruise or injury that would be slight and inconsequential to a younger person may have more serious physical consequences for someone of advanced years. It is therefore a rule of the Algoma Manor that any injury, however slight, sustained by a resident must be reported to the nursing staff.

20. It is against that background that the Board must assess the events involving Mrs. Campbell during the evening shift on August 12, 1978 and her subsequent discharge by the employer. On that day Mrs. Campbell's hours of work were from 3:00 p.m. to 11:00 p.m. in the Female Special Care Unit.

21. During the course of that shift it was the responsibility of Mrs. Campbell to bathe a resident (hereinafter Mrs. A) and to change her into her night clothes in preparation for bed. According to normal procedure the bath and change of clothing were performed in a washroom in the Special Care Unit. Mrs. Campbell found Mrs. A particularly difficult on that evening; she did not want to be changed and resisted Mrs. Campbell's efforts to undress her. Because Mrs. A is hard of hearing Mrs. Campbell had to raise her voice in order to get her to cooperate. She also had to exert a limited amount of force to remove her garments. During the removal of her clothing something caught on Mrs. A's finger and she suffered a slight abrasion or cut. The wound was not serious. Mrs. Campbell immediately put a bandage on it and reported the injury to the nurse on duty. During the course of the Board's proceedings counsel for the employer conceded that the grievor's treatment of Mrs. A did not constitute abuse of a resident.

22. The second and final incident occurred between 5:30 and 6:00 p.m. that evening. At that time Mrs. Campbell was responsible for bathing and changing another resident, since deceased, (hereinafter Mrs. B). It is common ground that Mrs. B was a tall and heavy woman. Various estimates given in evidence would place her weight at between 180 and 200 pounds. The victim of a stroke, Mrs. B was unable to walk unassisted and, while she could make certain sounds, she could not speak. She was described as exceptionally strong for a woman in her late seventies or early eighties; apparently as a result of her loss of speech she frequently became frustrated. The unchallenged evidence is that after her stroke there were occasions when she could be uncooperative and difficult to handle.

23. That evening Mrs. B was being uncooperative with Mrs. Campbell, who, with the assistance of a junior employee named Sheila Chillman, was trying to bathe her in the washroom. Mrs. B was undressed and seated in a po-chair which was placed in front of a sink. As Mrs. Campbell attempted to wash her Mrs. B placed her hands on the sink and repeatedly pushed the chair away, requiring Mrs. Campbell to wheel it back to the sink.

24. While a sponge bath of that kind can be performed, for the most part, while the elderly resident is in a sitting position, the normal routine is to have the resident stand in order to properly wash the thighs and lower abdomen. On this occasion Mrs. B refused to stand. When Mrs. Campbell and Mrs. Chillman had raised her partly to a standing position she began to struggle and refused to cooperate. In order to finish the job Mrs. Campbell then removed the chair from behind Mrs. B and, with the assistance of Mrs. Chillman, lowered her to the floor where she placed her in a sitting position. In that way Mrs. Campbell finished washing Mrs. B's thighs and lower abdomen as best she could. That operation lasted approximately a minute or two. Mrs. Campbell and Mrs. Chillman then raised Mrs. B and dressed her.

25. Next, Mrs. Campbell and Miss Chillman walked Mrs. B out of the washroom and down a hallway towards the sitting room. They proceeded, one on each side of her, supporting her from beneath the arms. Mrs. B was still angry and uncooperative and at that point she swung her arm toward Mrs. Campbell and clawed her severely on the neck. Reacting to the assault and to the severe scratch that she had received, Mrs. Campbell lost her hold on the resident. Because of Mrs. B's size and weight Mrs. Campbell and Mrs. Chillman then had to lower her to the floor. Mrs. B's anger did not abate and, on the hallway floor, she expressed her rage by kicking and lashing out with her arms.

26. In the stress of that moment, with a painful welt across her neck, Mrs. Campbell said to Mrs. Chillman that she did not want to work with an animal. She then instructed Mrs. Chillman to wait for a minute or two while Mrs. B. calmed down. When, after two or three minutes Mrs. B did become calm again Mrs. Campbell and Mrs. Chillman raised her from the floor and, with the assistance of another junior attendant, Miss Suzanne Bizier, they placed her in a geri chair. Through this incident Mrs. B did not suffer any hard fall or in any way sustain an injury. No medical attention was required and neither Mrs. Campbell nor either of the junior attendants reported the incident to the nursing staff. The incident was, however, stressful for all three of them, particularly for Mrs. Campbell who had the primary responsibility for Mrs. B. When it was all over Mrs. Campbell went to a nearby kitchen and lit a cigarette. She also took the opportunity to take a librium pill, medication which she was taking on prescription from a doctor as a result of tension caused by certain family problems.

27. It is on the basis of the incidents involving Mrs. A and Mrs. B that Mrs. Campbell was summarily discharged. On August 23, 1978 she was summoned to the office of Mrs. Helen Ledielt, the director of nursing at the Algoma Manor Home for the Aged. Present in her office were Mr. Hill and two other employees. Mrs. Campbell was then told that she was being discharged as a result of written complaints from other employees that had been received about her. Mr. Hill said that the complaints charged her with physical abuse of a patient and added that he was not at liberty to disclose which employees had signed the complaints. He read from several written statements which referred to the incident involving Mrs. B. He also told her that she had cut a resident with her fingernails, apparently referring to the incident involving Mrs. A.

28. Mrs. Campbell asked whether she would be given any right to defend herself or tell her side of the story. That was a futile request since at that point the decision had been taken to fire her and her termination slip and termination pay cheque were completed and waiting for her. She attempted to explain what had occurred only to be met by the response of Mr. Hill that he had no option but to terminate her.

29. The evidence of the employer is that the discharge of Mrs. Campbell on August 23rd came as the result of an investigation of the events of August 12, 1978 which, according to the evidence of Mrs. Ledielt, was undertaken upon the instruction of Mr. Hill. According to Mrs. Ledielt the investigation began when a nurses' aide, Dianna Strum, requested a transfer out of the Female Special Care Unit because she could not get along with Lois Campbell. The evidence discloses that Mrs. Campbell and Mrs. Strum had a personal disagreement during the evening shift of August 12, 1978 about who would go to supper first. It appears that there was considerable antagonism between Mrs. Strum and the grievor. The unrebutted evidence of Miss Diane Baskerville, a nurses' aide, is that on one occasion during this time period Dianne Strum told her that if Lois Campbell "didn't smarten up" she would tell Mrs. Ledielt that Mrs. Campbell was the union leader.

30. The issue in these proceedings is whether Mrs. Campbell's discharge was motivated by the employer's knowledge of her union activity. If the true motive for her discharge was the anti-union sentiment of the employer the Board may exercise its remedial authority to reinstate Mrs. Campbell into her employment with compensation for wages and benefits lost to her by virtue of the employer's breach of The Labour Relations Act.

31. Anti-union sentiment is seldom admitted by an employer as being the cause of a discharge. The Board is therefore often required to draw conclusions in that regard on the basis of inferences having regard to all of the evidence before it. In these proceedings the employer in the person of Mr. Hill and Mrs. Lediett denied any knowledge of the role of Mrs. Campbell in organizing the union campaign among the employees of the Manor. The evidence establishes, however, that the work place is not large and that, according to the testimony of several witnesses, Mrs. Campbell was widely known throughout the Home as the principal union organizer. It is notable that at the meeting which he convened in the auditorium Mr. Hill refused to answer Mrs. Campbell's questions about benefits because, in his own words to her "you went to the union". In light of the evidence the Board does not accept the testimony of Mr. Hill that by "you" he was referring to the employees generally when he was answering Mrs. Campbell. The Board is satisfied that Mr. Hill was aware of Mrs. Campbell's union activity several weeks prior to her discharge.

32. Given the employer's knowledge of Mrs. Campbell's union activity certain inferences may be drawn from the manner in which she was discharged. Where the evidence on a section 79 complaint discloses a discharge that appears unduly harsh and arbitrary given the normal circumstances in the work place, doubt may be cast on the validity of the reasons advanced by the employer as the reasons for discharge. A natural suspicion arises upon the discharge of an employee who is the chief organizer of a union when the discharge is unusually harsh and occurs during or immediately after a union campaign. (*Zehr's Markets Ltd.* [1971] OLRB Rep. Jan. 39). Although it is not the role of the Board to determine whether an employee has been dismissed for just cause, this does not mean that the circumstances surrounding a discharge may not give rise to an inference of anti-union motive.

33. In this case the Board heard considerable evidence of the daily realities of care in homes for the aged. The unchallenged evidence of several witnesses employed in the Algonoma Manor is that it is not uncommon for attendants to experience physical difficulty in handling a resident. The Board was informed that personnel sometimes have unforeseen trouble when moving a resident to or from a bed or a chair and must occasionally lower them to the floor if their grip gives way. That kind of emergency response is not physical abuse of a resident.

34. Careful scrutiny of the evidence respecting the incident involving Mrs. B reveals that it fell far short of the kind of physical abuse which the employer tried to make it out to be. Mrs. Campbell had to cope with strenuous resistance from Mrs. B in her attempts to give her a bath. She then suffered a severe scratch at the hands of Mrs. B as she walked her. As a result she was forced to lower the resident to the floor for a short time. While Mrs. Campbell may have committed an error of judgment in allowing herself a heated comment that might have been overheard by the resident, the employer's haste in all the circumstances to label the incident physical abuse of a resident giving the employer no alternative but to discharge Mrs. Campbell stretches normal credulity.

35. That is particularly so in light of the record of previous discharges in the home. Mrs. Campbell's own record and the manner in which the discharge was carried out. The evidence establishes that the Director of Nursing discharged only one other employee over a period of ten years. Mrs. Campbell had a record of good service to the Home's residents over all of her three years of work there. On August 23, 1978, within four weeks of her efforts to gather union membership support among her fellow employees, Mrs. Campbell

was summoned to the office of the Director of Nursing, where she was summarily discharged. She was not told the details of the charges against her, she was not told who her accusers were and perhaps most remarkably, she was not asked for her own account of what had happened. The arbitrariness of the employer's manner of firing Mrs. Campbell viewed against the reality of the incidents involving the two elderly residents confirms this Board in the conclusion that the grievor was made the victim of a deliberate distortion of those incidents. There was a wilful refusal by her employer to properly investigate the incidents. Having regard to all of the evidence the Board finds that the employer's "investigation" was a sham with the sole purpose of removing a union organizer from the Home.

36. This Board does not accept the submission of counsel for the employer that Mr. Hill and Mrs. Lediett were well intentioned but were misled by inaccuracies in the statements of complaint compiled against Mrs. Campbell as a result of Mrs. Lediett's investigation. Those statements are too loose and contradictory within themselves to be relied upon by any responsible employer.

37. The sheltering of the employer behind the written statement of Sheila Chillman is both transparent and disturbing. Mrs. Chillman's statement indicated that Mrs. B was being transferred from one chair to another when she scratched Mrs. Campbell. Miss Bizier's letter of complaint, however, stated, as was confirmed in the evidence, that in fact Mrs. Chillman and Mrs. Campbell were walking Mrs. B when that incident occurred. That contradiction and others like it were disregarded by the employer.

38. In her statement to Mrs. Lediett, Mrs. Chillman related "Mrs. A had the skin of her finger torn from Lois' long fingernails". When questioned about that before the Board Mrs. Chillman admitted that she had not witnessed that incident and had no personal knowledge of it. Moreover, while Mrs. Chillman's statement, a document prepared and written by Mrs. Lediett, said that "Lois let Mrs. B drop to the floor", her testimony before the Board was that in fact Mrs. Campbell lowered Mrs. B to the floor when she was assaulted, having no other alternative in the circumstances. It is significant that faced with these serious charges, brought as they were with inconsistencies and uncertainty, neither Mrs. Lediett nor Mr. Hill made any attempt to ascertain from Mrs. A or from Mrs. Campbell herself precisely what had happened.

39. From the evidence the Board must conclude that at the time of her discharge Mrs. Campbell had not abused the residents of the Home in any way. Moreover, it is also clear from the evidence that the employer had no honest or reasonable belief to that effect. The actions of the employer are far more consistent with an intention to get rid of Mrs. Campbell than with any honest attempt to ascertain the truth of the allegations of abuse.

40. Having regard to the totality of the evidence the Board finds that the employer has failed to establish that Mrs. Campbell's discharge was not motivated by anti-union sentiment. The Board is satisfied that the charge of resident abuse levelled against Mrs. Campbell was an unfounded pretext and that the reason for her discharge was that she led the campaign to establish union representation for the employees in the Home. The Board therefore orders that Mrs. Campbell be reinstated forthwith into her employment with full compensation for wages and benefits lost from the date of her discharge to the date of her reinstatement. In keeping with the Board's practice, the request of counsel for the grievor for an order respecting costs is denied. The Board shall remain seized of this matter in the event that the parties are unable to agree on the quantum of compensation.

CONCURRING DECISION OF BOARD MEMBER C. G. BOURNE:

1. I concur with the findings of the Board, but wish to draw attention to part of the evidence which bears heavily on the finding.

2. On June 8, 1978, the Ministry of Community and Social Affairs, seemingly in view of some incidents which had received wide publicity in the Press, issued a Memorandum to all Administrators of Charitable and Municipal Homes for the Aged entitled "Resident Protection from Abuse and Staff Discipline". With the Memorandum there were appended pages for insertion in the Manual of Administration.

3. Evidence was given that this material was received at Algoma Manor sometime in August, virtually coincidental with the incidents leading to Mrs. Campbell's dismissal.

4. The pertinent sections, on page 10e-2 read as follows:

"One item deserves special singling out here: **HARMING RESIDENTS OR OTHER PERSONS.**

A) *Any employee wilfully causing harm to, or abusing, a resident, visitor or other person should be dismissed.*

To try and define causing harm or abusing a resident is not always easy, but attacking, mistreating, slapping, shoving, striking, thrusting, smashing, beating, hitting, kicking, 'booting', 'banging' or pushing (into or against something), impelling, proding [sic], elbowing, shouldering, jostling, butting, jolting, thumping, thwacking, battering, buffeting, cudgeling, belaboring, jabbing, poking, rapping, pinching, 'nipping', any one or any variation or combination of these physically injurious alarming and discomforting acts constitutes abuse – and grounds for dismissal.

Tormenting or harassing a Resident verbally or by other forms of sign language or communication is equally reprehensible and not to be countenanced. This could include taunting, 'twitting', stigmatizing, slurring, goading, mimicing [sic], – all with intent to annoy or discomfort.

Because of the possibilities of misuse of otherwise 'good' remotivation techniques, '*behaviour modification*' may *not* be used in Homes for the Aged.

'Punishment' too *is not to be condoned.*

B) *Any employee or employees who witness an incident or incidents of resident abuse (or torment) and fail to report same to senior supervisory personnel are to be subject to disciplinary action."*

5. In coming to its conclusion in this case the Board has carefully considered all of the evidence and fully understands and appreciates the importance of the Ministry directive.

1506-78-U 1507-78-U International Union of Bricklayers and Allied Craftsmen, Local 2, (Complainant), v. **Bricklayers, Masons Independent Union of Canada, Local 1**, Bricklayers, Masons Independent Union of Canada Local 1 Welfare Trust Fund and John Meiorin, (Respondents).

1550-78-U 1551-78-U Labourers. International Union of North America, Local 506, (Applicant), v. **Bricklayers, Masons Independent Union of Canada, Local 1**, Bricklayers, Masons Independent Union of Canada, Local 1 Welfare Trust Fund and John Meiorin, (Respondents).

Construction Industry – Duty of Fair Representation – Section 79 – Welfare trust fund established to pay OHIP and insurance premiums on behalf of members – welfare fund did not pay premiums after employee resigned from membership – employees no longer in bargaining unit represented by respondent trade union – section 60 not available to employees.

BEFORE: Ian C. A. Springate, Vice-Chairman, and Board Members W. H. Wightman and D. B. Archer.

APPEARANCES: *A. M. Minsky for International Union of Bricklayers and Allied Craftsmen, Local 2; Chris G. Paliare for Labourers' International Union of North America, Local 506; Norman A. Endicott for the respondents.*

DECISION OF THE BOARD; April 3, 1979

1. Files 1506-78-U and 1551-78-U are complaints filed under section 79 of The Labour Relations Act in which the complainants allege that the respondents did violate sections 60 and 61 of the Act. Files 1507-78-U and 1550-78-U are each applications for consent to institute a prosecution of the respondents.

2. Bricklayers, Masons Independent Union of Canada, Local 1 ("Local 1") is party to two collective agreements with the Masonry Contractors' Association of Toronto Inc. on behalf of its member employers. One of these collective agreements covers bricklayers while the other covers bricklayer assistants. Both collective agreements require that except under certain exceptional circumstances the employers bound by the agreements will employ only members of Local 1. The collective agreement relating to bricklayers contains the following provision relating to a welfare plan. The agreement relating to bricklayer assistants has a similar provision with only the necessary changes in wording.

24. WELFARE

The parties hereto agree that the Welfare Plan presently in existence shall continue. The amount of monies to be paid by the Employer into the Welfare Fund shall be 55¢ per hour earned for each Journeyman Bricklayer and Stonemason employee covered by the bargaining unit.

The Welfare Report and remittance shall be paid on or before the 15th of the month following that month for which contributions are earned.

The Union shall have the option to apply portions of wages of this agreement to implement and extend the member's benefits and will notify the Party of the First Part for deductions and remittance of such amounts as required in accordance with this Agreement, then the wage rates will be automatically amended accordingly.

3. There is nothing before the Board to indicate that the union has required that part of employee wages be paid into the welfare fund. Thus it appears that the only amounts being paid into the fund are employer contributions calculated on the basis of fifty-five cents for each hour worked by employees covered by the two collective agreements.

4. The welfare plan referred to in the collective agreements is formally titled Bricklayers, Masons Independent Union of Canada Local 1 Welfare Trust Fund. The trust fund was created by a trust deed entered into in 1965 and apparently never amended since that time. The trust deed states that the fund shall be controlled and operated by six trustees, but in fact there are currently ten trustees, five being appointees of Local 1 and five representing employers bound by the Local 1 collective agreements. Mr. John Meiorin, the Secretary-Treasurer of Local 1, is also the administrator of the trust fund.

5. The trust deed states that the purpose of the fund is to make payments for a group insurance policy for members of Local 1 as well as to pay the expenses involved in the administration of the fund. It is agreed, however, that since 1971 the fund has made premium payments on behalf of members of Local 1 to the Ontario Health Insurance Plan ("OHIP"). The fund has been designated as a collectors group pursuant to section 16 of The Health Insurance Act.

6. Although these applications and complaints were filed by International Union of Bricklayers and Allied Craftsmen, Local 2 ("Local 2") and Labourers' International Union of North America, Local 506 ("Local 506"), at the hearing they were stated to have been filed on behalf of six former members of Local 1. During the hearing the case insofar as it related to one of these former members, Mr. R. Italiano, was for all intents abandoned. For convenience purposes the other five former members of Local 1 are hereinafter referred to simply as "the grievors".

7. All of the grievors were formerly long-term employees of Valley Forge Construction Ltd., a company bound to both of the Local 1 collective agreements. On varying dates between August 25, 1978 and October 27, 1978 the grievors left the employ of Valley Forge and went to work for another company not bound to the Local 1 collective agreements. All of the grievors also ceased to be members of Local 1 and joined another trade union. Four of the grievors who are bricklayers joined Local 2. The other grievor is a bricklayer assistant who joined Local 506.

8. Not long after the grievors left Local 1, and began to work for a contractor not bound by the Local 1 collective agreements, they were cut off from benefits in the Local 1 welfare trust fund. They were, however, advised by the executive of Local 1 that if they returned to membership in the Local they would once again be entitled to benefits from the

fund. None of the grievors returned to Local 1. As part of the cutting off of the grievors from benefits from the fund, no further OHIP payments were submitted on their behalf once it was learnt that they had left Valley Forge's employ and were no longer members of Local 1.

9. OHIP premiums are paid in advance of each three-month coverage period. Thus all the while the grievors were working for Valley Forge as members of Local 1 their OHIP premiums were paid by the fund. It is contended, however, that since the grievors worked for Valley Forge subsequent to the last payment on their behalf to OHIP, and since Valley Forge had continued to make payments into the fund all the time that they continued to be its employees, the fund should have paid their OHIP premiums for a further three-month coverage period. The amounts involved would have been nineteen dollars per month for any of the grievors who were single and thirty-eight dollars per month for those with one or more dependents.

10. It was the contention of the applicants/complainants that the action of the fund in not paying the grievors' OHIP premiums for a further three months amounted to conduct which was arbitrary, discriminatory and in bad faith contrary to section 60 of the Act. It was further contended that this action constituted a violation of section 61 in that it was an attempt to intimidate or coerce the grievors to cease to be members of Local 2 or Local 506 and to again become members of Local 1. In support of these contentions it was also alleged that the fund had not handled the monies paid to it in accordance with the requirements of The Health Insurance Act, and that this helped demonstrate the existence of the alleged unfair labour practices.

11. It appears that these proceedings have primarily been brought against the trust fund and also against Local 1 because of its apparent ability to influence the operation of the fund through the trustees which it appointed and through Mr. Meiorin in his capacity as administrator of the fund. While the matter is not free from doubt, for the purposes of these proceedings we are prepared to assume that the respondents are all proper parties to the proceedings.

12. Section 60 of the Act requires that a union not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of employees. After the grievors severed their connection with Valley Forge and Local 1, they were no longer employees in a bargaining unit represented by Local 1. Because of this we are unable to see how the respondents' actions could have been in violation of section 60. Further, we are of the view that the respondents did not act in an arbitrary, discriminatory or bad faith manner towards the grievors after they ceased to be members of Local 1 and to work for a contractor bound to the Local 1 collective agreements. The welfare trust fund is a fund specifically stated to be for the benefit of Local 1 members, and the grievors ceased to be entitled to the benefits of the fund once they withdrew from membership in Local 1 and ceased to be employed by a contractor bound to the Local 1 collective agreements. Further, we do not accept the contention that because the grievors were cut off from benefits from the fund when they left Local 1 and were told that they would be entitled to such benefits again if they rejoined Local 1, the respondents were engaging in intimidation or coercion. Because of the nature of the industry, construction industry welfare funds are almost invariably bargained for by trade unions and are each run in association with a particular trade union for the benefit of the members of that union. For an employee to change unions also means changing the wel-

fare fund from which he can draw benefits. To point out this fact can hardly amount to coercion or intimidation.

13. As for the claim that the trust fund was in violation of The Health Insurance Act because of the manner in which it handled the monies paid to it, that is a matter outside the jurisdiction of this Board and would more properly be raised in another forum.

14. No breach of The Labour Relations Act having been made out, these complaints and applications are hereby dismissed.

1702-78-R 1650-78-U 1651-78-U 1705-78-U 1706-78-U 1756-78-U 1757-78-U
Canadian Food and Associated Services Union, (Applicant), v. Cantor
Bakeries (Carrousel Franchising Ltd.), (Respondent), v. Group of Employees,
(Objectors).

Certification – Charges – Discharge – Membership Evidence – Application under section 7a – Board must be satisfied that Union has membership strength adequate for collective bargaining – Form 8 declarant uncertain as to circumstances relating to collection of initiation fees – membership evidence rejected – Employees active union organizers – discharged shortly after refusing to sign anti-union petition – failure of employer to satisfy burden of proof.

BEFORE: M. G. Picher, Vice-Chairman, and Board Members W. H. Wightman and M. J. Fenwick.

APPEARANCES: *M. Swenarchuk, Paul Boucher and Bob Charron for the complainants; Avrum Orenstein and Max Cantor for the respondent, Michael G. Horan and Ross Edgar for the objectors.*

DECISION OF M. G. PICHER, VICE-CHAIRMAN, AND BOARD MEMBER M. J. FENWICK; April 11, 1979

1. The Board orders that these complaints and this application be and the same are hereby consolidated.

2. These matters come before the Board by way of an application for certification and six complaints filed under section 79 of The Labour Relations Act.

3. The Board deals firstly with the application for certification. The applicant seeks bargaining rights for employees of the respondent's bakery in Ottawa. It submitted a total of twenty-three membership applications as evidence of its support among the employees on the terminal date fixed in this application. It alleges that the employer has breached The Labour Relations Act and that the employer's acts are such that the true wishes of the employees are not likely to be ascertained. The applicant therefore asks the Board to conclude that it has membership support adequate for the purposes of collective bargaining and to issue a certificate pursuant to its discretion under section 7a of The Labour Relations Act.

4. When a request is made for certification by the extraordinary means of section 7a of The Labour Relations Act the Board must, quite apart from being satisfied that the employer has breached the Act, be satisfied on the basis of reliable evidence that the union has membership strength adequate for the purposes of collective bargaining at the time of the hearing. (See *Dylex Ltd.*, [1977] OLRB Rep. June 357, affirmed sub. nom. *Re Marques and Dylex Ltd.* (1978), 18 O.R. (2d) 58 (Div. Ct.); *Viceroy Construction Company Limited*, [1977] OLRB Rep. Sept. 562; *Lorain Products (Canada) Ltd.*, [1977] OLRB Rep. Nov. 734.) One of the factors which the Board must consider in assessing the membership support of the applicant at the time of the hearing is the quality of the membership evidence filed in support of the application.

5. Documentary evidence of union membership is accepted and handled confidentially by the Board. A form of hearsay evidence, is not disclosed to the employer nor to any other party to the proceedings other than the applicant. The Board has therefore required a high standard of integrity in the gathering and filing of such evidence. A safeguard to that integrity is the Board's requirement that an officer or agent of the union file with the application a Declaration Concerning Membership Documents (Form 8), attesting to the making of personal inquiries to verify that persons whose names appear on the receipts for initiation fees are the persons who actually collected the monies paid and that each member indeed personally paid the amount shown on the document to the person whose name appears as collector. The form provides a space in which the declarant is required to indicate those instances where such verification could not be obtained, explaining the circumstances in each case.

6. In this case the Board heard evidence from the Form 8 declarant, Ms. Lynn C. Kaye, a solicitor who acted as agent of the applicant in the filing of this application. Ms. Kaye testified that she personally spoke with each of the collectors of membership documents for the applicant, received directly from them the \$1.00 initiation fee which they had collected from the employee on whose behalf a card was submitted and confirmed that the employee in question had indeed paid the money received and signed the application form. She further testified that prior to submitting the Form 8 Declaration she contacted each collector by telephone to again confirm the foregoing information.

7. That is not borne out, however, by the evidence of Robert Charron, an employee who acted as collector of a number of the membership documents filed. He testified that he did not give the monies which he collected directly to Ms. Kaye, but in fact gave them to another employee-collector, Mr. Paul Boucher, along with the cards collected, to remit to her. In his testimony he had no recollection of receiving a confirming telephone call from Ms. Kaye.

8. While the Board has no reason to believe that there has been any attempt to deliberately mislead it, it must, on the strength of the conflict in evidence, have grave doubts about the weight to be given to the membership evidence filed. While Ms. Kaye appeared to the Board to be an honest witness who made every effort to recollect the events she was testifying to, the inescapable conclusion is that her knowledge and recollection of those events falls short of what must be expected of a Form 8 declarant in an application for certification before this Board. Ms. Kaye's uncertainty as to where and when she spoke to each of the collectors, her inability to recall how she disposed of the initiation fees collected and the obvious conflict between her recollection and that of Mr. Charron compels the Board to con-

clude that it can place no reliance upon the membership evidence submitted in support of this application nor upon the Form 8 declaration filed. The application for certification is, therefore, dismissed.

9. The Board turns now to deal with the six section 79 complaints. The complaints allege that the six grievors, Paul Boucher, Yves Boucher, Dave McKenzie, Robert Charron, Robert Levesque and Pat Fridette were all discharged by the employer, contrary to sections 56, 58 and 61 of The Labour Relations Act. The union alleges that their discharge was motivated by the anti-union sentiment of the employer and requests the reinstatement of the grievors into their employment with compensation for all wages and benefits lost by virtue of their discharge.

10. The Board heard considerable evidence establishing a strong anti-union sentiment in the employer. The Board accepts the evidence of Allan R. McSherry, that during the union's campaign he was approached by Patrick Outhwaite, general manager of the respondent, and asked whether he knew anything about the union. When he replied that he did not want to get involved, Mr. Outhwaite stated that if the union came into the bakery he could lose his job. On another occasion Mr. McSherry was approached by Gabriel Milandra, a person who, in the opinion of the Board, exercises managerial functions within the meaning of section 1(3)(b) of The Labour Relations Act. Mr. Milandra accused Mr. McSherry of supporting the union along with the grievors, Paul Boucher, Robert Charron and Dave McKenzie. He stated that the union was no good and that if Mr. McSherry had a problem he should come directly to him. On a later occasion Mr. Milandra directed Mr. McSherry to go to an adjacent office to sign a petition against the union being circulated by an employee named Ross Edgar.

11. The evidence also establishes that on another occasion Mr. Outhwaite called a meeting of some fifteen or twenty employees. At that meeting Mr. Joe Triglia, vice-president of the respondent, spoke against the union and indicated to the employees that they should not support it and that the bakery might close if the union succeeded in representing the employees.

12. The evidence establishes that Paul Boucher, Dave McKenzie and Robert Charron were the employees instrumental in contacting the union and promoting the union's organizing campaign among the employees at the bakery. While Yves Boucher was more passive, and merely supported the union, it is clear from the evidence that the employer associated him with the efforts of his brother Paul.

13. The grievors, Paul Boucher and Robert Charron were discharged on December 13, 1978. Yves Boucher was discharged January 5, 1979, and Dave McKenzie was terminated on January 9, 1979. The grievors Robert Levesque and Pat Fridette were terminated on January 22, 1979. The respondent sought to explain the discharge of the grievors on the grounds that it was required to cut back its labour force in order to improve its profit position having regard to the volume of its sales. It also sought to justify their discharge as part of a pattern of heavy turnover of employees in an effort to find qualified people to staff the respondent's newly established bakery. While the Board accepts that the employer was implementing a decision to rationalize its work force for business reasons, the burden of the employer in these proceedings to satisfy the Board that anti-union sentiments formed no part of the reason for the termination of the grievors has not been discharged. (See, *Regina*

v. Bushnell Communications Ltd. (1973) 1 O.R. (2d) 442 (H.Ct.) upheld, (1975) 4 O.R. (2d) (C.A.), *Sheehan v. Upper Lakes Shipping* 77 CLLC ¶14,111 (F.C.A.), *Pop Shoppe (Toronto) Limited* [1976] OLRB Rep. June 294, *Barrie Examiner* [1975] OLRB Rep. Oct. 745, *Fielding Lumber* [1975] OLRB Rep. Sept. 665).

14. In this case, the evidence clearly establishes the open support of the union by each of the grievors and the employer's knowledge in that regard. The evidence establishes that at the time of the grievors' discharge more junior employees were kept on and shortly thereafter other employees were hired, even though the grievors were given to understand that they might be recalled if needed. While the grievors Levesque and Fridette were not active organizers for the union it is in the Board's view more than coincidence that they were both discharged on January 22, 1979 having both refused to sign a petition against the union on January 19, 1979.

15. Having regard, therefore, to the totality of the evidence the Board finds that anti-union sentiment was part of the motive for the discharge of each of the grievors and that their terminations were in breach of sections 56, 58 and 61 of The Labour Relations Act. The grievors shall therefore be reinstated forthwith into their employment with compensation for all wages and benefits lost from the date of their discharge to the date of reinstatement.

16. The Board shall remain seized of these complaints in the event that the parties are not able to agree on the quantum of compensation or any other aspect of the interpretation or implementation of this decision.

DECISION OF W. H. WIGHTMAN:

1. While I concur with my colleagues in the disposition of the application for certification and the section 79 complaints of the grievors, Paul Boucher, Yves Boucher, Dave McKenzie and Robert Charron I must dissent from the finding of the majority that the grievors Robert Levesque and Pat Fridette were discharged for union activity. I would have found, upon the evidence, that the sole reason for the discharge of Mr. Levesque was the quality of his work. I would also have found that the only reason for the discharge of the grievor Pat Fridette was the company's decision to discontinue the production and decoration of cakes at its Ottawa location. I would therefore not have ordered the reinstatement of these two grievors nor the payment of any compensation to them.

1670-78-R Canadian Resin Workers Union No. 187 National Council of Canadian Labour, (Applicant), v. **C.G.T. Industries Ltd.**, (Respondent), v. United Rubber, Cork, Linoleum and Plastic Workers of America, (Intervener).

Certification – Collective Agreement – Two bargaining units may exist under one collective agreement – voluntary recognition granted by employer when no employees in bargaining unit – no collective agreement bar to application

BEFORE: Rory F. Egan, Alternate Chairman, and Board Members W. H. Wightman and W. F. Rutherford.

APPEARANCES: *S. B. D. Wahl, Leon J. Labonte and Cyril S. Hoadley for the applicant; James T. Heather, A. P. Tarasuk, F. R. Hoddle and W. R. Atkinson for the respondent; H. P. Rolph, L. Collins and R. Duguay for the intervener.*

DECISION OF THE BOARD; April 23, 1979

1. The name “Canadian General-Tower Limited” appearing in the style of cause of this application as the name of the respondent is amended to read: “C.G.T. Industries Ltd.”

2. The applicant and intervener have each applied for certification as bargaining agent for a group of employees of the respondent at Burlington. Each of the parties filed membership cards in support of the respective applications and the matter was duly listed for a hearing.

3. The Board finds that the applicant and the intervener are both trade unions within the meaning of section 1(1)(n) of The Labour Relations Act.

4. At the initial hearing and for the first time in the proceedings, the applicant raised, as a bar to the applications, what purported to be a collective agreement made between the applicant and the respondent. (The employer named in the agreement is Joy Baby Products but the name was changed to C.G.T. Industries Ltd. effective September 14, 1978.) The intervener challenged the validity of the collective agreement.

5. The document filed by the applicant at the hearing states that it was made and entered into on the 27th day of September, 1978. Article 2 of that agreement provides:

The Company recognizes the Union as the sole and exclusive bargaining agent for all its employees in the cities of Hamilton and Burlington save and except foremen, foreladies, persons above the rank of foreman and forelady, office, technical and sales staff and persons employed for not more than 24 hours each week. This Collective Agreement covers the employees of the Company located at its plant at 19 Princess Street, Hamilton, Ontario.

This unit is hereinafter referred to as “unit #1”.

6. The evidence makes it clear that the document which was in fact signed by the

parties on September 27, 1978 contains a recognition clause which was different from the foregoing. Article 2 in this document reads as follows:

The Company recognizes the Union as a sole and exclusive bargaining agent to deal with all matters arising from this agreement for all hourly rated employees and excluding all salaried employees including foremen, foreladies, persons above the rank of foreman and forelady, office, technical and sales staff and persons employed for not more than 24 hours each week.

This unit is hereinafter referred to as "unit #2".

7. The applicant has represented employees of the respondent at a plant in Hamilton for a number of years and has concluded collective agreements with respect to these employees at least as far back as 1969. The agreements carried the recognition clause similar to that set out lastly above.

8. The document containing unit #2 had been filed by the applicant pursuant to section 74 of the Act. It was produced at the hearing from the files of the Minister by the intervener and the difference between the unit in that document (unit #2) and that in the document produced at the hearing by the applicant (unit #1) became apparent.

9. The copy of the collective agreement containing the reference to Hamilton and Burlington, it later turned out, had also been filed with the Ministry but by the employer. This filing was not apparent to the intervener when it made its search in the Ministry, but was produced at a second hearing through the person in charge of such matters.

10. The evidence was that during the negotiations leading to the agreement signed on September 27, 1978, it was recognized that the Hamilton plant might be relocated at Burlington. The union sought to have the scope clause altered to include that municipality. The agreement, however, was signed without amendment to the scope clause. Subsequently, however, the company sent the union the following letter:

October 2, 1978

Mr. C. Hoadley,
National Council of Canadian Labour,
70 Jerome Crescent, PH-3,
Stoney Creek, Ontario.
L8E 3H1

Dear Sir:

In keeping with a request made by yourself at the last meeting between the company and the union held September 27, 1978 in Hamilton re. representing the new plant to be opened in Burlington, the company has considered the request and submits the following revised Article 2 "Recognition of Bargaining Unit" for your consideration.

"Article 2 – Recognition of Bargaining Unit

The Company recognizes the Union as the sole and exclusive bargaining agent for all its employees in the cities of Hamilton and Burlington save and except foremen, foreladies, persons above the rank of foreman and forelady, office, technical and sales staff and persons employed for not more than 24 hours each week. This Collective Agreement covers the employees of the Company located at its plant at 19 Princess Street, Hamilton, Ontario.”

We would appreciate a decision at your earliest convenience so that we can proceed with printing the Collective Labour Agreement.

Yours truly,

CANADIAN GENERAL-TOWER LIMITED

“F. R. Hoddle”,
Industrial Relations Manager.

The evidence establishes that at a further meeting held in mid-October the change in the scope clause was accepted and confirmed. Nothing new was executed and the amendment was carried out simply by removing the original front page of the agreement signed on September 27th and replacing it with a new page, with the same date, containing the altered scope clause. There were no employees at Burlington at this time.

11. Allegations of collusive fraud were made by the intervener with respect to the foregoing but these were dismissed at a second hearing set by the Board to deal with them and other issues. They are mentioned here only for the purpose of confirming the dismissal.

12. The Board has consistently recognized the rights of parties to a collective agreement to agree to expand the scope of the collective agreement even where there are no employees present in the new area at the time the agreement is entered into. In the present case, however, there is, as argued by the intervener, on the face of the agreement which the applicant raised at the first hearing an indication that the intent was to assure rights in a second unit comprising Burlington employees rather than to enlarge the existing unit to include Burlington. The intervener pointed out that the document states it was made between the applicant and Joy Baby Products “at Hamilton” and that designation remained unaltered on the new page. More persuasive of the intent to create a new unit, however, is the statement in the agreement which specifically provides that it covers the employees of the company located at its plant at 19 Princess Street, Hamilton, Ontario. The unavoidable inference is that the employees of the Hamilton plant were viewed as comprising one bargaining unit and that, consequently, the Burlington employees would form a second bargaining unit.

13. The document is made between the applicant and Joy Baby Products at Hamilton and that designation remained unaltered on the new page. More persuasive, however, is the statement in the agreement which specifically provides that it covers the employees of the company located at its plant at 19 Princess Street, Hamilton, Ontario. The unavoidable inference is that the employees of the Hamilton plant were viewed as comprising one bargaining unit, whereas the Burlington employees would form another bargaining unit.

14. That two distinct units might be included in one document found to be a collective agreement is not without precedent. (See *Ontario Hydro*, [1978] OLRB Rep. Aug. 754; *Hickeson-Langs Supply Co.*, [1978] OLRB Rep. Nov. 996.)

15. The conduct of the parties up until the very morning of the hearing is entirely consistent with the view that the scope clause had created two units.

16. The fact that the application itself described the unit sought as comprising employees at Burlington and that the estimated number of employees involved as set out in the application approximated only the members at Burlington confirms the intent evident upon the face of the agreement that a separate unit was contemplated.

17. Furthermore, the Reply of the respondent and the lists filed are restricted to employees at Burlington. The number of employees in the plant is shown as sixteen and the number in the proposed unit is shown as sixteen in the Reply. The applicant said there were thirteen in the unit it sought and the intervener said fifteen. Obviously, on the bases of all of the documentary evidence filed, the parties were dealing with a bargaining unit at Burlington and not a combined unit. This, again, is confirmatory of the intent shown on the face of the collective agreement.

18. In view of all this, we are unable to accept the explanation attempted by the applicant for its last-minute attempt to rely upon the agreement of September 27th or, indeed, upon its predecessors which it materially altered and made specific as to areas. The fact is, as we have already indicated, that the documents confirm the fact that there are two bargaining units involved and that the application and intervention apply to that at Burlington.

19. The Board further finds that at the time the respondent purported to give voluntary recognition to the applicant there were no employees in the bargaining unit at Burlington whom they could have been entitled to represent.

20. The matter therefore is to be dealt with as an application for certification without any pre-existing rights on the part of the applicant and with a parallel application by way of intervention.

21. The Board further finds that all employees of the respondent at Burlington, save and except foremen and foreladies, persons above the rank of foreman and forelady, office, quality control and sales staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

22. The Board is satisfied on the basis of all the evidence before it that not less than forty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on January 19, 1979, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

23. The Board is satisfied on the basis of all the evidence before it that not less than forty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the intervener on January 19, 1979, the terminal

date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

24. The Board accordingly directs that a representation vote be taken of the employees of the respondent in the bargaining unit. All employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

25. Voters will be asked to indicate whether they wish to be represented by the applicant or the intervener in their employment relations with the respondent.

26. The matter is referred to the Registrar.

1401-78-R 1480-78-R 1481-78-R Christian Labour Association of Canada, (Applicant), v. **Chateau Gardens (Queens) Inc.**, (Respondent), v. London and District Service Workers' Union, Local 220, SEIU, AFL, CIO, CLC, (Intervener).

Bargaining Rights – Sale of Business – Trade Union held bargaining rights for employer in one municipality – business sold and established in different municipality – whether bargaining rights follow to new municipality – Business closed down and sold – employees transferred to purchaser's other location or laid off – business re-opened two years later – whether bargaining rights continue – employees recalled from lay-off.

BEFORE: Rory F. Egan, Alternate Chairman, and Board Members J. D. Bell and C. A. Ballentine.

APPEARANCES: *W. R. Herridge, J. Kamphof and S. Cass for the Association; Barry Adams and Albert Grove for the company; Ted Wohl and Charles Davidson for the trade union.*

DECISION OF THE BOARD; April 6, 1979

1. The Board directs that these applications be consolidated. All three applications have been made under the provisions of section 55 of The Labour Relations Act.

2. The name "Chateau Gardens (Queens Avenue) Inc." appearing in all three styles of cause as the name of the respondent is amended to read: "Chateau Gardens (Queens) Inc."

3. In the interest of clarity, we wish to point out that in these applications we are dealing with two premises situated in Strathroy known as Shady Lane Nursing Home and Merry Hill Nursing Home respectively, and with two premises in London. One of these latter premises is located at 310 Oxford Street and is called Chateau Gardens (London) Inc.

The other is situated at 518 Queens Avenue and had been called Queens Ave. Manor Ltd. until September 19, 1977 when the name was changed to Chateau Gardens (Queens) Inc. It is clear that there has been no sale of a business between Queens Ave. Manor Ltd. and Chateau Gardens (Queens) Inc. since all that occurred was a change in name.

4. In File No. 1401-78-R it is conceded that the sale of a nursing home business known as Merry Hill Nursing Home in Strathroy to Chateau Gardens (Queens) Inc. took place and that some seven employees were taken on at Chateau Gardens (Queens) Inc. These employees had been represented in the Merry Hill Nursing Home by Christian Labour Association of Canada (CLAC) at the time the closure of Merry Hill and the transfer of employees occurred.

5. File No. 1480-78-R deals with an alleged sale of Chateau Gardens Inc. operating as Shady Lane Nursing Home in Strathroy to Chateau Gardens (Queens) Inc. The latter institution was officially opened, according to the Minister of Health, on October 23, 1978. There is no dispute that the sale took place nor that at the time all employees of Shady Lane Nursing Home, with certain exceptions not here relevant, were represented by London and District Service Workers' Union Local 220 (hereinafter called Local 220). It is further agreed that two members of that bargaining unit were transferred to and employed at Chateau Gardens (Queens) Inc. where they are presently employed.

6. File No. 1481-78-R has to do with a claim by Local 220 for bargaining rights with respect to employees at Chateau Gardens (Queens) Inc. whom it had previously represented in a nursing home known as Queens Ave. Manor Ltd. at 518 Queens Avenue in London. The claim rests upon the certification of Local 220 in 1973 for employees at Queens Ave. Manor Ltd. on subsequent collective agreements and the recall of two employees laid off under the terms of a collective agreement.

7. There were approximately 24 to 26 full-time employees at the time of the hearing, comprising the two who were recalled, seven from Merry Hill, three from Shady Lane, and a number of new employees.

8. Clearly, the applications dealing with the transfer of operations and employees from the two Strathroy homes to London are in a different category to that dealing with the nursing homes and bargaining units which were always in London and which are dealt with in File No. 1481-78-R.

9. The bargaining rights with respect to Shady Lane Nursing Home and with respect to Merry Hill Nursing Home were for employees of both of these homes at Strathroy. It is clear that if the two Strathroy employers had not sold their respective businesses but had moved them from Strathroy to London, that is, from the geographic area covered by the certification or collective agreements to a different geographic area, the bargaining rights, in the absence of contractual language to the contrary, would not follow. The situation where a sale involves a movement out of the geographic area and bargaining unit defined in the collective agreement into another geographic area by reason of a sale was referred to by the Board in *Mountain View Dairy Ltd.*, [1967] OLRB Rep. Feb. 911. In that case, although the Board pointed out that the case was not disposed of on that ground, the Board did suggest that the position of a bargaining agent under a sale should not be better than it would be where an employer relocated his business in a new geographic area.

10. It was urged by CLAC that in view of the fact that a sale had taken place within the meaning of the Act and the further fact that there had been an intermingling, the Board ought to exercise its broad discretionary powers under section 55(6) and order a two-way vote. Its position was that the *Mountain View Dairy* case was not decisive of the question and that since there were no geographical limitations set out in section 55, the Board ought not to introduce them.

11. The Board, having considered the above submissions in the present case, is of the opinion that the result suggested in the *Mountain View Dairy* case (supra) ought to be applied in the present case.

12. The Board, in the exercise of the discretion afforded it under section 55 of the Act, accordingly declares that the trade unions who held the bargaining rights for employees at Shady Lane Nursing Home and at Merry Hill Nursing Home respectively in Strathroy are not the bargaining agents for any of the employees at Chateau Gardens (Queens) Inc. in London.

13. In 1976 the business carried on at Queens Ave. Manor Ltd. was sold to Chateau Gardens (London) Inc. located at 310 Oxford Street in London. At the time of the sale, the employees at the 310 Oxford Street home were represented by CLAC. Employees at Queens Ave. Manor Ltd. who were represented by Local 220 under a collective agreement that expired in March 1977, had been advised on October 7, 1976 that the Manor would close and that they might elect to transfer to the Oxford Street home. A number of the employees did transfer but two employees did not and were laid off. The Queens Ave. Manor Ltd. premises were closed down and remained closed until after alterations were completed. The premises were renovated and opened again under the name of Chateau Gardens (Queens) Inc. some two years later. The two employees who had been "laid off" when Queens Ave. Manor Ltd. closed down were, in the terms used by Local 220, "recalled" in August 1978 to work at Chateau Gardens (Queens) Inc.

14. Following the sale of the Queens Ave. Manor Ltd. business to the Oxford Street home and upon an application of Local 220 under section 55 of the Act in November 1976, a three-way vote was directed by the Board among the employees of the Oxford Street home. This vote was won by Local 220. The Chateau Gardens (London) Inc. home is still in operation at Oxford Street and its employees are represented by Local 220.

15. As noted above, during the period of late October or November 1976 until the fall of 1978, there was no nursing home operation at 518 Queens Avenue, London, (the premises which had housed Queens Ave. Manor Ltd.), until nursing operations commenced there under the name of Chateau Gardens (Queens) Inc. on or about October or November 1978.

16. Local 220's claim to a representative role with respect to employees of Chateau Gardens (Queens) Inc. is, as already observed, not truly based upon section 55 but upon its bargaining history with respect to Queens Ave. Manor Ltd., as indicated earlier, and particularly upon what purports to be a collective agreement made between itself and Queens Ave. Manor Ltd. on October 31, 1977. The scope clause of that agreement purports to cover all employees of Queens Ave. Manor Ltd. "at its nursing home in London". Local 220 also relied upon the "recall" of the two employees referred to above and a Memorandum of Settlement dated November 9, 1978. (The use by the parties of the contraction "Ltd." with re-

spect to Queens Ave. Manor in the applications and in the purported collective agreements was not dealt with at the hearings and it seems plain that nothing turns upon this lack of precision.) Both the agreement and the Memorandum of Settlement show Queens Ave. Manor Ltd. as employer, rather than Chateau Gardens (Queens) Inc., notwithstanding the change of name referred to above. The reason for this was not touched upon but, in any event, it would appear to be of little consequence since the same corporate entity is involved at all times.

17. It was argued by CLAC that by reason of the sale of the Queens Ave. Manor Ltd. business in 1976 to the Oxford Street nursing home and the subsequent vote held under section 55, any rights held by Local 220 with respect to the two laid-off employees were wholly transferred to the Chateau Gardens (London) Inc. operation and those rights formerly held by Local 220 with respect to the Queens Avenue entity were wholly exhausted. That being the case, CLAC appears to argue that the collective agreement upon which Local 220 relies is a voluntary recognition agreement made at a time when there were no employees in the bargaining unit.

18. The latter certainly was the situation insofar as persons being actually at work at the time the agreement was signed. That is, no operations to which the bargaining unit in the collective agreement related were in progress when the agreement was signed on October 31, 1977. At the time of the layoff, however, the employees at Queens Ave. Manor Ltd. were covered by the terms of a collective agreement which was effective to March 31, 1977. Notice of layoff was given to the employees of Queens Ave. Manor Ltd. On October 7, 1976. This notice advised the employees that, effective on or about November 4, 1976, the Manor would "cease to operate as a nursing home" and that a new licence would be issued to Chateau Gardens (London) Inc. The notice advised that this new company at Oxford Street had agreed to offer continuity of employment to all former employees of the Manor.

19. Paragraph 4 of the notice reads as follows:

For those of you that are covered by the collective agreement this shall constitute notice of layoff. We have advised the union and will keep it informed in the best interest of all concerned.

20. The CLAC submission also emphasized the fact that the Manor had surrendered its licence and, as set out in the notice referred to above, had "ceased to operate" so that the "layoff" must be seen to be a permanent termination of employment. There was a brand new licence issued to Chateau Gardens (Queens) Inc. The latter is, of course, as we have already said, simply Queens Ave. Manor Ltd. with a new name.

21. The Board was advised, however, that the laid-off employees were told at the time it took place that the layoff would last for one to two years but that no date was given for recall. The employees concerned were notified of a recall by telephone sometime in August of 1978, that is, some two months before the reopening as Chateau Gardens (Queens) Inc.

22. It flows clearly from the evidence of Mr. Albert Grove, who is Vice-President of Chateau Gardens (Queens) Inc., that after the sale of the business then known as Queens Ave. Manor Ltd., the directors of that corporation and Local 220 considered that the latter retained the bargaining rights for the two employees who had been laid off. This follows not

only from the fact that the employees were advised of the probably length of the layoff but, more particularly, from the fact that the Manor and Local 220 continued, during the period when the Manor was closed down, to negotiate and enter into agreements on what must be inferred as being a recognition of the two persons as employees on layoff and the Local as their bargaining agent, pending the reopening of the business. The conduct of the parties certainly indicates that the two employees were not considered to have been terminated as they well could have been.

23. The question raised by CLAC, as already indicated, is whether the bargaining relationship between the Manor and Local 220 was entirely destroyed by reason of the sale and subsequent decision of the Board granting Local 220 the bargaining rights at the Oxford Street home. In our opinion, this cannot be the result of that transaction.

24. It is obvious that had there been no sale and had Queens Ave. Manor Ltd. simply closed down and laid off all its employees under the terms of the collective agreement with intent to reopen in a year or two, Local 220 would have the right to continue as bargaining agent for the laid-off employees, at least for as long as they retained that status.

25. If there had been a sale of a part of the business, there can be no doubt that under section 55 the bargaining rights would encompass the remaining portion of the business notwithstanding the status afforded it in the purchasing employer's business. That is to say, the bargaining rights under a sale do not necessarily travel as a whole.

26. In the present case there was an understanding at the time of the sale that the business would reopen; so that the choice given to the employees of accepting employment with the other company or of accepting layoff was a genuine choice with a real chance of recall. In that case it was open to Local 220 to assert its rights in both areas and to continue to represent the employees on layoff even while pursuing its rights under section 55 with the transferred employees. It can do this without jeopardizing residual bargaining rights with respect to the laid-off employees.

27. Some support for the foregoing may be found in *Silverwood Dairies*, (1976) 12 L.A.C. (2d) 225 (Weatherill). In that case the predecessor, Silverwood, sold its "home service dept." to a successor who continued to employ the employees formerly employed in the department. Some of the employees filed grievances against Silverwood's alleging that *with respect to it* they had been laid off and were entitled to exercise their seniority rights under the Silverwood agreement (which now bound both Silverwood and the successor) in order to bid for jobs in other Silverwood departments. In upholding their claim, the majority of the board of arbitration stated:

"While it would be our view that s.55 of the Labour Relations Act applies with respect to the sale of the home service business, we do not consider that the effect of s.55 is such as to deprive employees working in the business or part of the business which is sold from exercising rights under the collective agreement as against the original employer. In the instant case, when Silverwoods ceased to operate the home service department, employees therein were in effect laid off by Silverwoods. They were then, in our view, entitled to exercise seniority rights pursuant to the collective agreement to which Silverwoods was a party."

28. In the result then we find that Local 220, by virtue of the collective agreement of October 31, 1977 and subsequent amendments, is the bargaining agent for all employees of Chateau Gardens (Queens) Inc., save for the exceptions set out in the agreement.

2000-78-M Labourers' International Union of North America, Local 183, Applicant, v. The Metropolitan Toronto Apartment Builders Association and Costain Limited, Respondents.

Arbitration – Discharge – Section 112a – Senior Employee assigned light work after injury pursuant to collective agreement – Employer laid off senior employee due to lack of work – Decision based on ability to do available work – Collective agreement silent with respect to seniority

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members C. Ballentine and R. D. Joyce.

APPEARANCES; *B. Fishbein and L. Castaldo for the applicant and R. A. Werry for Costain Limited, no one appeared for The Metropolitan Toronto Apartment Builders.*

DECISION OF THE BOARD; April 26, 1979

1. The applicant has referred to the Board a grievance concerning the interpretation, application or alleged violation of a collective agreement for final and binding arbitration. The referral is made under section 112a of The Labour Relations Act.
2. The applicant alleges that Costain Limited ("Costain") has violated the current collective agreement between the applicant and the respondent Metropolitan Toronto Apartment Builders Association ("the Association") covering house builders, to which Costain is bound. The applicant alleges that one Giovanni Cirillo was discharged by Costain on February 7, 1979 contrary to clause 3.01 of Article 3 – Management Rights of the collective agreement and that he was not paid one day's notice as required by schedule "A", article 3.01 of the agreement. At the hearing the parties agreed that the issue of notice had been settled and was withdrawn from the grievance.
3. This matter was originally scheduled for hearing on March 20, 1979, but was adjourned by agreement of the parties on the request of the applicant. By letter dated March 30, 1979, counsel for the applicant advised the Board in part as follows:

"We wish to advise that in addition to Articles of the Collective agreement referred to in the grievance dated March 5th, 1979 and the Referral of Grievance to Arbitration dated March 5th, 1979, the Applicant also relies on Article 11 of the Collective Agreement. As well, the termination of the grievor occurred on or about March 1st, 1979 and not February 7th, 1979, as referred to in the grievance, dated March 5th, 1979."

At the hearing, counsel for the respondent agreed that the correct date of termination of employment was March 1, 1979, but reiterated his objection contained in a letter to the Board dated April 12, 1979 that the applicant's intention to rely on Article 11 of the collective agreement was an attempt to amend the grievance and should not be allowed. The Board heard the representations of the parties and ruled that the grievance to be heard would be the grievance as set out in the applicant's letter to the Association dated March 5, 1979, which was filed with the referral and in the Form 78 Referral of Grievance to Arbitration under Section 112a Construction Industry dated and filed with the Board March 5, 1979, except as amended by the aforementioned agreements of the parties. Furthermore, the Board, having regard for the following language contained in clause 3.01 of the collective agreement, ruled that the applicant had, by its letter dated March 30th, served proper notice on the respondent of its intention to rely on Article 11 of the collective agreement in arguing its case:

3.01 The Union agrees that it is the exclusive function of each Employer covered by this Agreement:

- (ii) to hire, discharge, classify, transfer, promote, demote, lay-off, suspend or otherwise discipline Employees, provided that a claim by an Employee that he has been discharged, suspended, disciplined, or has been subjected to disciplinary demotion without reasonable cause shall be subject to the provisions of Grievance Procedure;

and it is agreed that those functions shall not be exercised in a manner inconsistent with the express provisions of this agreement."

The parties agreed that the Board was properly seized with the grievance as defined by the applicant's letter to the Association and referral to the Board, each dated March 5, 1979, amended as noted above.

4. The grievance simply stated is that Cirillo was discharged on or about March 1, 1979, by Costain without reasonable cause. The position of the respondent Costain is that the employee was laid off for lack of work.

5. Cirillo has worked for Costain for some sixteen years. At the time of the incident giving rise to the grievance, he was employed as a construction labourer on a residential project in Board area #8 called Brimley Forest on which Costain was building houses and which had been started in May 1978. By February 1979 much of the project had been finished and the number of labourers had reduced gradually to three, including Cirillo, from a peak of eight labourers employed during the summer of 1978. Costain determined that there was work available for two labourers only and advised Cirillo on March 1st that he was being laid off at the end of that day.

6. The need for laying off one construction labourer is not at issue. The applicant, however, holds that Costain did not have reasonable cause for laying off Cirillo and should have laid off one of the other two labourers. At the time Cirillo was notified of his lay off, he was assigned to cleaning the insides of the houses. He had been transferred to this work by Costain in the fall of 1978 because it was considered to be lighter work. Twice before during his employment he had been assigned to similar work. On November 29, 1978, shortly after

Cirillo had been assigned to work inside, he hurt his back and was on a compensable absence for 10 weeks until February 6, 1979 when he returned to the same work. Around the same time when Cirillo was moved inside, two of the other seven labourers were laid off and by mid-January 1979 there were only two labourers remaining on the project in addition to Cirillo. They continued to be assigned to work outside, work which Costain claimed to be heavier than that which Cirillo was doing. When it became necessary for Costain to lay off one of the three remaining labourers, it elected to lay off Cirillo, and not one of the other two, because the work remaining to be done on the project included heavy work to which they were not prepared to assign Cirillo. Thus Costain kept the two employees whom it deemed capable of performing all of the remaining work. One of them had 13 or 14 years total service with Costain and the other 5 or 6.

8. The clauses of the collective agreement relative to the issue in this case are:

3.01 The Union agrees that it is the exclusive function of each Employer covered by this Agreement:

- (i) to conduct his business in all respect in accordance with its commitments and responsibilities, including the right to manage the jobs, locate, extend, curtail or cease operations, to determine the number of men required at any or all operations, to determine the kinds and locations of machines, tools and equipment to be used and the schedules of production, to judge the qualifications of the Employees and to maintain order, discipline and efficiency;
- (ii) to hire, discharge, classify, transfer, promote, demote, lay-off, suspend or otherwise discipline Employees, provided that a claim by an Employee that he has been discharged, suspended, disciplined, or has been subjected to disciplinary demotion without reasonable cause shall be subject to the provisions of Grievance Procedure.

Article 11 – Re-instatement Upon Return from Absence Resulting from Compensable Accident

- 11.01 An Employee returning from absence resulting from a compensable accident encountered while performing his assigned duties during his employment with an Employer shall return to the job he held prior to such absence or if such job is not available, be re-employed at work generally similar to that which he last performed, if such work is available and he is medically able to perform the same, at the rate of pay prevailing for such job at the time of his return.
- 11.02 If the Employee's prior job is no longer available and similar work is not available, or the Employee by re-entering the Classification causes an excess number of Employees, the Employee who has been with the Employer the least time in the Classification will be subject to lay-off.
- 11.03 An Employee who returns to employment but who remains partially disabled and, therefore, unable to perform his usual duties and respon-

sibilities, shall be re-employed by the Employer in a Classification in which he is medically able to perform the work thereof at the rate of pay prevailing for such job at the time of his return.”

9. Clauses 3.01(i), (ii) and (iv) of Article 3 – Management Rights clearly grant Costain the exclusive function to do such things as judge the content of jobs, the qualifications of employees and to classify and lay-off employees. There are no other clauses in the collective agreement which take away or reduce these rights. Therefore, the only limitations placed on the employer in exercising them is that which is contained in the phrase “... these functions shall not be exercised in a manner inconsistent with the express provisions of this Agreement.” in clause 3.01. Costain has found itself in a situation where it had work available for two labourers only, it assessed the content of the work and determined that the two other labourers were the ones most capable of doing it, retained them and laid Cirillo off. While Cirillo has the longest service of the three labourers, there is nothing in the collective agreement which obligates Costain in these circumstances to retain Cirillo because of his longer service. On the evidence, then, there is nothing to establish that Costain acted without reasonable cause when it laid off Cirillo, or acted in excess of its express rights under Article 3 – Management Rights.

10. It remains now to determine if Costain exercised these management functions “... in a manner inconsistent with the express provisions ...” of the collective agreement with the applicant. The applicant alleges that, in laying off Cirillo on March 1st following his return to work on February 6th from a compensable absence, the respondent has violated Article 11 – Re-instatement Upon Return from Absence Resulting from Compensable Accident of the collective agreement.

11. It is clear from the wording of Article 11, including its title, that its conditions are to apply upon an employee’s return to work. Cirillo was placed in the same job on return to work as he had been doing prior to his injury. The applicant alleges that Costain’s action of laying off Cirillo some four weeks later circumvents the purpose of the article. The Board finds nothing in the evidence which supports that allegation.

12. There being no evidence or allegation of Costain’s actions being inconsistent with other express provisions of the collective agreement, the Board finds that Cirillo has not been discharged without reasonable cause and that in laying him off, Costain has not exercised its rights under the collective agreement in a manner inconsistent with its express provisions.

13. The application is dismissed.

1957-78-R Louise Morin, Applicant, v. Local 756 of the Hotel and Restaurant Employee's and Bartender's International Union, Respondent, v. **Duke's Hotel (1977) Inc.**, Intervener.

Petition – Termination – Petition did not name Local – evidence established that employees sought decertification of respondent – vote ordered

BEFORE: Pamela C. Picher, Vice-Chairman and Board Members R. W. Redford and H. Simon.

APPEARANCES: *Louise Morin for the applicant; A. J. Sandy Potter and Jacques Hebert for the respondent and no one for the intervener.*

DECISION OF THE BOARD; April 3, 1979

1. The name "Local 756 Hotel & Restaurant Employees & Bartenders International Union" appearing in the style of cause of this application as the name of the respondent is amended to read: "Local 756 Of the Hotel and Restaurant Employee's and Bartender's International Union".
2. The applicant has applied to The Labour Relations Board under section 49 of The Labour Relations Act for a declaration that the respondent union no longer represents the employees in the bargaining unit for which it is the bargaining agent.
3. Ms. Louise Morin testified as to the origination, preparation and circulation of the statement of desire. Having regard to all of the evidence the Board is satisfied that notwithstanding the fact that the petition was signed on the employer's premises during working hours it represents the voluntary wishes of the employees. The evidence clearly establishes that members of management were not in any way involved in the origination or circulation of this petition.
4. The preamble of the petition reads as follows:

"This petition is a request asking for the termination of the Hotel & Restaurant Employees and Bartenders International Union.
We are no longer interested in being represented by this Union or any other Unions."

The respondent argues that the application should be dismissed because the preamble refers to the International rather than Local 756. In support of its position the respondent referred the Board to its decision in *Patrick McKeon*, [1973] OLRB Rep. Nov. 603. A review of the *McKeon* case, however, reveals that it is readily distinguishable from the facts of the instant case. In *McKeon* the Board dismissed the application for termination because the wording of the preamble to the petition and the testimony of the petitioners were so ambiguous that the Board was left in doubt as to whether the employees who signed the petition understood the nature of the document they were signing. It was unclear whether they thought that the petition would lead to a decertification of the Local union as their bargaining agent or whether it would cause the Board to sever, somehow, the Local's relationship with the International.

5. In this case the wording of the preamble and the testimony of the witness raise no doubt as to the employees' intention in signing the petition. Though the preamble names the International rather than the Local, the evidence clearly shows that the employees intended to seek the decertification of their bargaining agent. In these circumstances the Board does not view the fact that the employees erroneously named the International instead of the Local in the preamble as a fatal defect to their application. In *Genwood Industries Limited*, [1976] OLRB Rep. Aug. 417 the Board expressed its reluctance to adopt an excessively legalistic approach in evaluating a statement of desire filed by employees in a termination application. At page 419 the Board said:

"It is the duty of this Board to concern itself with the substance and not merely the form of documents tendered in support of an application for the termination of bargaining rights ...

...It is the intention of section 49 that it shall be the primary concern of the Board to ascertain the wishes of employees voluntarily expressed in writing. The right of employees to come before us would be seriously abridged, and the ability of the Board to ascertain their wishes would be unnecessarily fettered, if we were to adopt [a] "forms of action" approach...The right of a group of employees to bring their written wishes before the Labour Relations Board cannot be made to depend strictly upon the choice of words made by persons who may be uninitiated in the niceties of pleading. Frequently, as here, petitions of this kind are drafted by rank and file workmen of limited writing ability and without the assistance of legal counsel. To adopt the legalistic approach suggested would be unrealistic and would frustrate the intention of the Act."

6. Accordingly, the Board is satisfied on the basis of all the evidence before it that not less than forty-five per cent of the employees of Duke's Hotel (1977) Inc. in the bargaining unit, at the time the application was made, had voluntarily signified in writing that they no longer wish to be represented by the respondent union on March 16th, 1979, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent union under section 49(3) of the said Act.

7. The Board directs that a representation vote be taken of the employees of the intervener. Those eligible to vote are all employees of Duke's Hotel (1977) Inc. at 154 Main St. W. Pt. Colborne Ont. save and except the owners on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

8. Voters will be asked to indicate whether they wish to be represented by the respondent in their employment relations with Duke's Hotel (1977) Inc.

9. The matter is referred to the Registrar.

1439-78-R 1447-78-R United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46, (Applicant), v. **English & Mould Ltd.** and Argus Refrigeration & Air Conditioning Limited, (Respondents).

Reconsideration – Related Employer – Declaratory relief to operate prospectively only – factors considered by Board

BEFORE: E. Norris Davis, Vice-Chairman and Board Members J. D. Bell and W. F. Rutherford.

DECISION OF THE BOARD; April 26, 1979

1. The applicant seeks reconsideration of the Board's decision of February 9, 1979 solely in regard to the effective date of the Board's declaratory judgment. The applicant acknowledges that no new evidence is to be offered, but that in other cases where the Board has exercised its discretion to make a declaration under section 1(4) of the Act the declaration has been made effective from the date of application or at least fully effective from the date of the decision. In the instant case the Board specifically made its declaration effective from the date of its decision only in respect to new work acquired and not in respect to work then in progress.

2. In our view, in cases such as this, where the Board has concluded that associated or related activities or businesses are being carried on through more than one corporation, the Board, in granting relief which it deems appropriate, should weigh all the surrounding circumstances of the individual case. The instant case is not one in which the associated corporations embarked on a deliberate format for the direct erosion of the applicant's bargaining rights: the activities of Argus did not in any way adversely affect the employment or status of the applicant's members employed by E & M. Indeed, the evidence is clear that irrespective of the activities of Argus, the volume of work available at E & M was not and could not have been affected.

3. It would be inequitable for the Board not to consider these circumstances in fashioning declaratory relief, and to weigh them, together with the fact that Argus entered into binding obligations to perform work, predicated in its then existing cost structure. The damages, if any, which may have been incurred by the union, on its members, in this case are indirect and remote and do not warrant the imposition of a financial penalty on the respondents by drafting the declaratory judgment in such fashion as to make work already completed or in progress subject to such declaration.

4. The Board therefore refuses the request for reconsideration.

1440-78-M United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46 and Ontario Pipe Trades Council, (Applicant), v. **English & Mould Ltd.** and Argus Refrigeration & Air-Conditioning Limited, (Respondents).

Construction Industry – Related Employer – Section 112a – Allegation that related employer in violation of collective agreement – alleged incident occurred prior to effective date of Board declaration – whether entitled to relief – interpretation of clause purporting to bind firms or companies incorporated by party to agreement

BEFORE: E. Norris Davis, Vice-Chairman, and Board Members J. D. Bell and W. F. Rutherford.

APPEARANCES: *L. C. Arnold and W. Howard for the applicant; Robert Douglas Perkins, Donald Key and Donald Kirk for the respondents.*

DECISION OF THE BOARD; April 26, 1979

1. The name: “Mechanical Contractors Association of Toronto, Mechanical Contractors Association of Ontario, English & Mould Ltd. and Argus Refrigeration & Air-Conditioning Limited” appearing in the style of cause of this application as the name of the respondent is amended to read: “English & Mould Ltd. and Argus Refrigeration & Air-Conditioning Limited”.
2. This is an application under section 112a of The Labour Relations Act.
3. This present panel of the Board was also seized of applications under section 1(4) and section 55 made by the same applicant, and involving as respondents English and Mould Ltd. and Argus Refrigeration and Air-Conditioning Limited and which applications were consolidated. The Board by decision of February 9, 1979 (Board Files 1439-78-R and 1447-78-R) disposed of those applications. The Mechanical Contractors Association, named as a respondent herein, was not a party to those former proceedings, and after receipt of notice in the current proceedings informed the Board of its intention not to enter an appearance. The Board therefore proceeded in their absence.
4. The parties appearing before the Board agreed that the evidence taken in Board files 1439-78-R and 1447-78-R should be accepted as having been tendered in the present proceedings, and together with additional evidence to be adduced would be the evidence on which the Board should base its decision in the present matter.
5. The applicant alleges contraventions of the collective agreement commencing June 15, 1978 between itself and English and Mould Ltd. (hereafter referred to as “E & M”) in respect to Article 34.2 of that agreement, or alternatively, in respect to Article 11 of the agreement.
6. At the outset, we note that the declaration made by the Board on February 9, 1979 was that E & M and Argus constituted one employer for the purposes of the Act, and that such declaration would be effective in respect to all future contracts of mechanical

work in the I.C.I. sector of the construction industry. In our view, that declaration effectively brings those specific activities within the coverage of the collective agreement existing between E & M and the union: by the same token, it is clear that, save for the Board's declaration, Argus was and is a separate legal entity and employer, not signatory to the collective agreement and with no obligations thereunder prior to the Board's declaration. It therefore follows that in respect to Argus' activities ante-dating the Board's declaration no liability can accrue or relief be sought under the collective agreement insofar as Argus is concerned. That leaves open the question as to whether the activities complained of constitute a violation of the contract by E & M.

7. In addition to the evidence tendered in the preceding files, the respondent through Arthur Key, testified that no new work within the scope of the collective agreement has been tendered by Argus since February 9, 1979, and that all work previously initiated and/or tendered was anticipated to be completed by early April 1979. To this general position there was one exception relative to a tender affecting an OHIP building at 2550 Yonge Street, Toronto, Ontario, where it now appeared that work would not commence before the fall of 1979, if indeed it went ahead at all.

8. The respondent also called Donald Kirk who testified that since the February 9, 1979 declaration by the Board, E & M has continued its long standing policy of not bidding for work where non-union contractors are involved.

9. Certain evidence relating to proof of damages was led by the applicant through Mr. William Howard to which it is not necessary to refer at this stage.

10. We shall now deal with the alleged contravention by E & M of Article 11.1 of the collective agreement which reads as follows:

"Recognizing that the Contractor can sub-contract, no Contractor shall, directly or indirectly, sub-let or sub-contract or otherwise transfer to any employee, or any other employer not signatory to a U.A. agreement any of the work coming under the jurisdiction of this agreement."

11. The applicant argues that in essence E & M has sub-contracted work to Argus, or has at least (in the language of the Article) "otherwise transferred" such work to Argus in breach of the collective agreement. In reading Article 11.1 as a whole it seems clear to us that whether one concentrates on the words "sub-contract", or "directly or indirectly sub-let or sub-contract", or "otherwise transfer", they all have a common underlying connotation of work, of which the contractor is at one time possessed, being moved, at his initiative, to some other person for performance. In the case before us the evidence is that any mechanical work done by Argus in the I.C.I. sector was work which Argus itself tendered on and was awarded. As to whether or not Argus would acquire such work was dependent solely on the judgment of the party calling for tenders; and E & M had not even a remote influence in that regard. Further, the evidence was that E & M for some considerable period before Argus entered the I.C.I. sector, as well as during Argus' presence in the I.C.I. sector, and subsequent to February, 1979 never bid on jobs of this nature, and therefore never became possessed of any work which it could in some fashion turn over to Argus. It is our conclusion that E & M did nothing which could be considered a contravention of Article 11.1 of the agreement.

12. The applicant also alleges that E & M has violated the collective agreement by employing persons other than members of the union to perform work within the scope of the agreement. The reference is, of course, to persons employed by Argus. Argus, at the time of such employment was a separate and distinct employer from E & M and employment by Argus cannot be equated with employment by E & M and the grievance, in this respect, must fail.

13. The applicant argues, alternatively, that E & M is in breach of Article 34.2 of the agreement which reads as follows:

“It is understood that this Agreement shall apply to all firms or companies engaged in the specific character of work covered by this Agreement, which may be or hereafter are incorporated by any member of the Association and which are owned or controlled directly or indirectly by them.”

14. The respondent's argument, stated simply, is that Argus is not a “firm or company” which was incorporated by it and therefore the obligation of Article 34.2 does not attach.

15. The applicant argues that, in order to interpret the clause to avoid an absurd result, having regard to the purpose of the clause, that the use of the word “incorporate” should not be viewed in its corporate law sense of bringing a separate legal entity into existence, but in its broader sense of “putting things together”. The applicant further argues that the word “and” in the phrase “... and which or owned or controlled directly or indirectly by them”, should be interpreted disjunctively thus providing a distinct alternative situation so that the clause would apply both to “firms and companies” which are “incorporated” and to “firms or companies” which are “owned or controlled” directly or indirectly.

16. It seems to us that, as a matter of interpretation, we are first called upon to ascribe meaning to the words, “firms or companies”. Each of those terms is capable of embracing statutory corporations as well as unincorporated entities. Under such circumstances we look to the language used by the parties in Article 34.2 for further definition. If the parties used the word “incorporated” in its “corporate law” sense that then points us in one direction, and if used in the broader general sense we are pointed in a different direction.

17. We turn to Webster's 3rd New International Dictionary at page 1145 for a general definition of “incorporate” which is,

“to unite with or introduce into something already existent so as to form an indistinguishable whole that cannot be restored to the previously separate elements without damage.”

Applying that definition to Article 34.2, it seems to us, has the effect of rendering the words “and which are owned or controlled directly or indirectly by them”, totally meaningless and mere surplusage. If E & M were the instrumentality for unity with another business entity to form an “indistinguishable whole” then it is obvious that the resultant entity would automatically, have to be owned or controlled by E & M, and the “owned or controlled” phrase would be wholly redundant. We must therefore conclude that the parties in using the words

"owned or controlled" had in contemplation some set of circumstances other than those covered by defining the word "incorporate" in its general sense.

18. Those words, "owned or controlled", do have necessary and understandable meaning if we view the word "incorporated" in its corporation law sense. E & M could be instrumental in bringing a corporate entity into existence under a great variety of differing circumstances. It would be unreasonable to expect that E & M would obligate itself as to the behaviour of such entity unless it was an entity of which E & M had ownership or control that E & M could fulfill such an undertaking and it was that circumstance that the parties intended to provide for by the language. It is therefore our opinion, that in reading the article as a whole, we must conclude that "incorporated" is used in its "corporate law" sense, and that Argus is not an entity which falls within the language "which may be or hereafter are incorporated by any member of the Association".

19. The grievance is therefore dismissed.

1789-78-R Wilfred L. Waller, (Applicant), v. United Brotherhood of Carpenters and Joiners of America, Local 3054, (Respondent), v. Wayne A. Assaf and **Fashion Craft Kitchens Inc.**, (Intervener).

Sale of a Business – Termination – Timeliness – Application for termination filed within one year of the Board's declaration under section 55 – Application untimely

BEFORE: R. A. Furness, Vice-Chairman, and Board Members H. J. F. Ade and C. Ballentine.

APPEARANCES: *J. E. Tovey and Wilfred L. Waller for the applicant; J. H. Melnitzer and Adam Salvona for the respondent; Donald J. McKillop, Q.C., Heinz Slottke and James E. Bowden for the intervener.*

DECISION OF THE BOARD; April 25, 1979

1. The applicant has applied to the Board under section 49(2)(a) of The Labour Relations Act for a declaration that the respondent no longer represents the employees in the bargaining unit for which it is the bargaining agent. This application was filed on January 30, 1979.

2. The respondent has adopted the position that this application is untimely.

3. The respondent and Cassin-Remco Limited were parties to a collective agreement which became effective on May 19, 1976, and expired on December 31, 1978. Article 30 of the collective agreement provides that the collective agreement shall be automatically renewed for successive periods of twelve months unless either party requests the negotiation of a new agreement by giving written notice to the other party not less than thirty days and not more than ninety days prior to the expiry date of the agreement. The respondent served

notice to bargain on October 31, 1978. This notice was given to Wayne A. Assaf and Fashion Craft Kitchens Inc.

4. On January 19, 1979, the respondent filed an application under section 55 of the Act and requested a declaration that there had been a sale of a business from the predecessor employer, Cassin-Remco Limited, to the successor employers, Wayne A. Assaf and Fashion Craft Kitchens Inc., and a further declaration that the successor employers, Wayne A. Assaf and Fashion Craft Kitchens Inc. are bound by the collective agreement. (See Board File No. 1727-78-R.) At the hearing on February 9, 1979, the Board ruled that the application would be granted and in a decision dated February 14, 1979, the Board stated:

1. This is an application brought under section 55 of The Labour Relations Act for a declaration that there has been a sale of a business within the meaning of the section.

2. Counsel for the respondent informed the Board at the outset that upon reviewing the matter the respondent had decided not to oppose the application. Accordingly, the Board hereby declares that there has been a sale of a business within the meaning of section 55 of the Act and that the successor employer is bound by the collective agreement to which the applicant union and the predecessor employer were party.

(The successor employer therein was Wayne A. Assaf and Fashion Craft Kitchens Inc.)

5. Under section 55(3) a trade union may give notice to bargain to a successor employer. Such notice has the same effect as notice under section 13 or 45. Section 55(10) provides that for the purposes of sections 5, 49, 53 and 112, a notice given by a trade union or council of trade unions under subsection 3 or a declaration made by the Board under subsection 6 has the same effect as a certification under section 7. Under section 49(1) a trade union is protected from an application for termination for one year after its certification. Section 55(10) is specifically applicable to the facts of this application. For the purposes of section 49, no application to terminate the respondent's bargaining rights may be made within one year from the giving of notice to bargain or the date of the declaration by the Board. In this regard see the *Irving-Charles Supermarkets Limited* case, [1965] OLRB Rep. 406, and the *ITT Canada Limited* case, [1970] OLRB Rep. 330.

6. Having regard to the foregoing, this application is untimely and is dismissed.

1781-78-R 1797-78-R 1844-78-R 1845-78-R 1848-78-R 1855-78-R United Steelworkers of America, (Applicant), v. **Fotomat Canada Limited**, (Respondent).

Appropriateness – Bargaining Unit – Certification – Membership Evidence – Multi-municipal locations with no transfer of employees between municipalities – municipal bargaining units appropriate – Town of Bowmanville now part of larger Town of Newcastle – Town of Newcastle appropriate bargaining unit – Collector signing membership card and receipt without receiving money – membership evidence signed by collector rejected – Employee mailing one dollar and membership card signed by collector to Union – Union official substitutes her name as collector – membership evidence accepted – full disclosure by Union of irregularities on Form 8 viewed favourably by Board in accepting membership evidence.

BEFORE: Ian C. A. Springate, Vice-Chairman and Board Members H. J. F. Ade and A. Hershkovitz.

APPEARANCES: *S. Grant and M. Shane for the applicant; J. C. Murray and D. Gillespie for the respondent.*

DECISION OF IAN C. A. SPRINGATE, VICE-CHAIRMAN AND BOARD MEMBER H. J. F. ADE; April 17, 1979

1. We find that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.
2. These are a number of applications for certification which were dealt with at a single hearing before the Board.
3. The respondent is engaged in the sale and development of photographic film. It carries on the retail end of its operations through a number of kiosks located in various communities throughout southern Ontario. Generally two employees (referred to as “photomates”) work in each of the kiosks. The applicant is seeking to be certified as the bargaining agent for certain of these employees.
4. In larger centres such as Metropolitan Toronto and Oshawa the respondent operates a number of kiosks. In smaller communities such as Trenton and Alliston it operates only one. Currently all of the kiosks in the province and grouped by the respondent into four administrative areas referred to as London area, the Hamilton area, the Ottawa area and the Toronto area. Of these four administrative areas, the Toronto area covers the greatest amount of territory.
5. In these applications the applicant is seeking to be certified to represent some, but not all, of the respondent’s retail employees in its Toronto administrative area. It is the applicant’s position that the Board should treat the employees working in the kiosks in each municipality as a separate bargaining unit, with all of Metropolitan Toronto being considered as a single municipality. Because in some municipalities the respondent only operates a single kiosk, to adopt this approach would result in certain bargaining units with only two employees.

6. The position of the respondent is that all employees within its Toronto area should be included within a single bargaining unit. To do otherwise, it contends, would require it to deal with a multiplicity of similar bargaining units. The bargaining unit being contended for by the respondent would encompass some 230 employees working in 22 different municipalities. These municipalities are spread out over a fairly wide geographic area from Oakville and Orangeville in the west to Belleville in the east and from Barrie and Lindsay in the north to Lake Ontario on the south. Certain of these municipalities, such as Brampton and Richmond Hill, are distinct communities located in close proximity to Metropolitan Toronto. Others, such as Oshawa and Peterborough, are urban centres in their own right. Still others, such as Alliston, Lindsay and Port Hope are smaller communities not in the immediate vicinity of any large urban centre.

7. In support of its claim that a single bargaining unit would be appropriate the respondent noted that the duties of all of its retail employees are essentially the same no matter where they are employed. It also noted that all of the employees in its Toronto administrative area are employed under the same terms and conditions and are all supervised out of the same location in Metropolitan Toronto. While employees are frequently transferred between kiosks located in the same municipality, the respondent acknowledged that employees are seldom transferred between municipalities.

8. Generally the Board defines retail bargaining units in terms of specific municipalities such that employees at all outlets operated by an employer within a given municipality will come within the same bargaining unit, but employees working in different municipalities will not be included in the same unit. It should be noted that this limitation of bargaining units to individual municipalities is not something particularly unique to the retail field. Indeed as discussed in some detail in the *Wix Corporation Limited* case, [1975] OLRB Rep. Aug. 637, the Board's practice is not to include more than one municipality within the scope of a single bargaining unit unless there are exceptional circumstances which call for such a result (although all of Metropolitan Toronto is generally treated as a single municipality).

9. Having particular regard to the limited extent to which the respondent's employees are transferred between municipalities, we are not satisfied that the respondent has demonstrated sufficient reasons to cause the Board to depart from its general practice of limiting bargaining units to a single municipality. There is nothing before us which suggests that single municipality units would substantially impair the employer's operations. While the respondent has voiced a concern with the possibility of having to deal with a multiplicity of bargaining units, we feel that any drawbacks associated with such a development are more than outweighed by the restrictive effect that a single bargaining unit would have on the right of the respondent's employees to decide whether or not they wish to be represented for collective bargaining purposes. For example, some 70 per cent of the respondent's retail employees in Metropolitan Toronto have expressed a desire to be represented by the applicant. However, if the respondent's views as to the appropriate bargaining unit were to be accepted, then the right of these employees to collective bargaining would depend on whether or not employees in a host of other cities and towns also share a similar desire. We feel that this type of situation should be avoided unless other considerations are sufficiently compelling so as to call for such a result, which in our view is not the situation here.

10. Having regard to our reasoning set out above, we are satisfied that any bargaining units determined in these proceedings should each be described in terms of a single municipality.

11. In File Nos. 1844-78-R, 1845-78-R and 1848-78-R, the applicant requested that it be certified to represent employees in Belleville, Trenton and Bowmanville. In each of these three files the membership evidence was accompanied by a Form 8, Declaration Concerning Membership Documents, signed by a solicitor in the employ of the applicant. The Form 8 in each case indicates that at least certain of the membership evidence to which it relates was obtained in somewhat unusual circumstances. At the hearing counsel for the respondent indicated that he had no reason to doubt the statements contained on the Form 8's, and submissions as to the acceptability of the membership evidence involved was made on the basis of those statements.

12. With respect to File Nos. 1844-78-R and 1845-78-R, the Form 8's indicate that all of the applicant's membership cards were signed by Mr. Rick Bigelow as the collector of a dollar prior to any such sums actually being paid by the employees involved. After signing the cards Mr. Bieglow arranged for them to be delivered to the employees. The completed cards and some money were later returned to Mr. Bigelow. We gather that the cards and money from each of the two locations involved were forwarded to Mr. Bigelow in a single sealed envelope. We were not informed as to who placed the cards and the money in the envelopes or who delivered them to Mr. Bigelow. The Form 8 in File No. 1845-78-R indicates that Mr. Bigelow later confirmed by telephone with the employees "that each had signed the cards and paid initiation fees on their own behalf on the dates indicated." The Form 8 submitted in File 1844-78-R states that Mr. Bigelow phoned the employees to confirm that "each had signed her card and paid the initiation fee on her own behalf."

13. In certification proceedings the Board must rely on hearsay evidence to determine the applicant's membership strength. As in these proceedings, that evidence usually takes the form of membership application cards with an attached receipt portion indicating payment of a dollar. This evidence is not, in the normal course of events, shown to the respondent, nor is the respondent permitted to cross-examine employees as to its truth. Further, apart from checking employee signatures on application cards against specimen signatures supplied by the respondent, the Board itself customarily accepts the cards at face value. In light of these facts the Board has consistently demanded a high standard of integrity on the part of those who submit membership evidence, and has also required that it be able to rely on the membership evidence with a high degree of assurance that the information contained thereon is correct.

14. With respect to the two files under consideration, Mr. Bigelow signed the cards as collector without having received any money. He later did receive back the cards after they had been completed as well as some money. However, it appears that he did not receive them directly from the employees but rather from some other, unnamed, person. We thus do not know who actually received the completed cards and any money payment from the employees. Further, the Form 8's in both files make no specific reference to the amounts received by the applicant union but indicate only that initiation fees were paid. Thus the only clear statement from anyone acting on behalf of the applicant that each employee paid at least a dollar in connection with his membership card is contained on the receipt portion of each of the cards over the signature of Mr. Bigelow. However, the receipts were signed at a time when none of the employees had paid any money in connection with the membership applications. In all of these circumstances we feel that we cannot place any reliance on the membership evidence submitted with respect to these two files. Accordingly we hereby dismiss the applications for certification in both File No. 1844-78-R and File No. 1845-78-R.

15. The situation in File No. 1848-78-R is somewhat different. In connection with this file the applicant submitted two applications for membership with attached receipts. The Form 8 indicates that Mr. Bigelow personally received the completed card and one dollar from one of the employees, and that he signed the card as the collector of a dollar. However, he gave this employee a second card which he pre-signed as collector to give to the second employee. This second employee signed the card and then mailed it along with a dollar to the applicant's offices in Toronto. The card with the dollar were received at the applicant's offices by Ms. Mary Shane, a representative of the applicant. Ms. Shane by telephone confirmed with the employee that she herself had signed the card and paid the money. The card was subsequently filed with the Board with the signature of Mr. Bigelow scratched out and that of Ms. Shane inserted instead as collector.

16. The circumstances surrounding the receipt of the mailed card along with the notation of what occurred on the Form 8 would appear to meet the Board's requirements for acceptable mailed membership evidence. (See: *Canadian Gypsum Co. Ltd.*, [1961] OLRB Rep. Nov. 280.) Ms. Shane was in fact the proper collector in that it was she who actually received the card and a dollar from the employee, even though it was done through the postal service.

17. We are prepared to accept as valid both of the cards submitted in file No. 1848-78-R. As already noted, the card received by Ms. Shane through the mail was handled in such a way as to meet the Board's requirements with respect to mailed membership evidence, and we do not feel the fact that Mr. Bigelow's signature as collector was scratched out and replaced by the signature of Ms. Shane is sufficient to detract from this fact. In comparing the circumstances surrounding this card with those in the two previously mentioned files, we would note that we feel that greater reliance can be placed on a card and a dollar arriving directly from an employee through the mail than can cards and money claimed to have been given by employees to an unnamed individual who later delivers them to someone else who then purports to act as the collector. In accepting the card signed by Mr. Bigelow as collector where the Form 8 indicates that he actually received the card and a dollar initiation fee from the employee concerned, we have put great weight on the fact that the applicant came forward to note the unusual circumstances surrounding certain of its membership evidence. There is nothing in this case which suggests that the applicant has sought to withhold any known irregularities or to mislead the Board as to the true state of affairs. Rather the applicant has apparently made a full disclosure and indeed the respondent did not make any submissions to the contrary. In these circumstances we do not feel that the mere fact that Mr. Bigelow signed this particular card as collector is a sufficient basis for us to decline to give it any weight.

18. As already indicated, in file 1848-78-R the applicant asked to be certified with respect to Bowmanville. However, as the Board noted at the hearing, with the passage of *The Regional Municipality of Durham Act, 1973* the former Town of Bowmanville became part of the enlarged Town of Newcastle. In these circumstances we find that all employees of the respondent engaged in retail sales in the Town of Newcastle, save and except supervisors and persons above the rank of supervisor, constitute a unit of employees of the respondent appropriate for collective bargaining.

19. We are satisfied, on the basis of the evidence before us, that more than fifty-five per cent of the employees of the respondent in the bargaining unit set out in paragraph 18

above, were members of the applicant on February 16, 1979, the terminal date fixed for this application and the date which we determine, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

20. In File No. 1848-78-R a certificate will issue to the applicant with respect to the bargaining unit described in paragraph 18 above.

21. In File No. 1797-78-R the applicant asked to be certified for a unit of employees employed in Port Perry. As the Board noted at the hearing, however, Port Perry is not a separate municipality but rather forms part of the township municipality of the Township of Scugog. (See: *The Regional Municipality of Durham Act, 1973*, section 2.) In these circumstances we find that all employees of the respondent engaged in retail sales in the township municipality of the Township of Scugog, save and except supervisors and persons above the rank of supervisor, constitute a unit of employees of the respondent appropriate for collective bargaining.

22. We are satisfied, on the basis of the evidence before us, that more than fifty-five per cent of the employees of the respondent in the bargaining unit set out in paragraph 21 above were members of the applicant on February 9, 1979, the terminal date fixed for this application and the date which we determine, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

23. In File No. 1797-78-R a certificate will issue to the applicant with respect to the bargaining unit described in paragraph 21 above.

24. With respect to File No. 1781-78-R we find that all employees of the respondent engaged in retail sales in the City of Oshawa, save and except supervisors and persons above the rank of supervisor, constitute a unit of employees of the respondent appropriate for collective bargaining.

25. We are satisfied, on the basis of the evidence before us, that more than fifty-five per cent of the employees of the respondent in the bargaining unit set out in paragraph 24 above were members of the applicant on February 7, 1979, the terminal date fixed for this application and the date which we determine, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

26. In File No. 1781-78-R a certificate will issue to the applicant with respect to the bargaining unit described in paragraph 24 above.

27. With respect to File No. 1855-78-R we find that all employees of the respondent engaged in retail sales in the municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor, constitute a unit of employees of the respondent appropriate for collective bargaining.

28. We are satisfied, on the basis of the evidence before us, that more than fifty-five per cent of the employees of the respondent in the bargaining unit set out in paragraph 27

above were members of the applicant on February 19, 1979, the terminal date fixed for this application and the date which we determine, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

29. In File No. 1855-78-R a certificate will issue to the applicant with respect to the bargaining unit described in paragraph 27 above.

DECISION OF BOARD MEMBER A. HERSHKOVITZ

I concur with the decision of the majority of the Board except for File No. 1844-78-R and File No. 1845-78-R. My dissent in the matter of the above mentioned file numbers is based on the fact that there was complete disclosure of the manner in which the signatures were obtained on the cards involved. That there was no intent to deceive the Board was clearly established by a document that was submitted by Mr. Lorne Ingle and concurred in by all parties.

Because of the facts as stated I would grant certification in the matter of the foregoing file numbers.

2163-78-M Gardette Limited, (Employer), v. United Steelworkers of America, (Trade Union).

Bargaining Rights – Bargaining rights continue notwithstanding that a receiver has been appointed to administer the affairs of the company

BEFORE: M. G. Picher, Vice-Chairman and Board Members J. D. Bell and D. B. Archer.

APPEARANCES: *No one appearing for the employer; Brian Shell and Alex Sharpe for the trade union.*

DECISION OF THE BOARD; April 27, 1979

1. This is a reference to the Board by the Minister under section 96 of The Labour Relations Act of a question relating to his authority to appoint a Conciliation Officer.

2. Having regard to the evidence the Board finds that Mr. Henry Vine, a receiver administering the respondent's business on behalf of certain creditors, is administering the business of Gardette Ltd. including the employment of its staff who are represented for collective bargaining purposes by the respondent. The fact that the respondent's company is under the administration of a receiver does not alter its obligation to its employees and to their trade union under The Labour Relations Act.

3. The Minister is therefore advised that he does, in the circumstances of this case, have the jurisdiction to appoint a Conciliation Officer.

1165-78-R Teamsters Local 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, (Applicant), v. **Greb Industries Limited**, (Respondent), v. Group of Employees, (Objectors).

Charges – Representation Vote – Section 79 – Employer statement circulated prior to representation vote – No breach of Act arising from statement – No improper interference with Vote (Dissent of Board Member B. Lee – Majority decision reported [1979] Feb. O.L.R.B. Rep. 89)

BEFORE: R. A. Furnes., Vice-Chairman, and Board Members W. Gibson and B. Lee.

DECISION OF BOARD MEMBER B. LEE: April 30, 1979

1. Having read the majority decision, I dissent.
2. The applicant has asked the Board to ignore the results of the representation vote and to order a new vote. In support of that request, it alleges that the employer's letters violate sections 56 and 61 of the Act. Both of these sections come under the general heading of "Unfair Practices".
3. I find that the letters delivered to the homes of the employees just prior to the vote exceed the employer's right to express his views and interfere with the employees' rights to select a trade union, contrary to section 56 of the Act. I find that they have the effect of impairing the ability of employees to freely express their true wishes in the vote, and hence, I would set aside the vote.
4. The letters viewed as a whole are not explicitly or openly anti-union, but the aim is clearly to raise doubts in the minds of the readers as to the wisdom of voting for this union. They have an anti-union flavour to them. A reasonable employee would perceive the implication that the employer hoped they would vote against the union.
5. I find that a reasonable employee would view paragraphs three, four and six of the letter of November 10, taken together in the context of a subtly anti-union letter, as a veiled threat to their job security, should the union be certified, and a suggestion that the company's problems will be more likely to be eliminated if there is no union. The references to job security, heavy losses, tremendous problems and difficult and agonizing decisions create the impression that the operation has been on the brink of folding. To deliver that message at that time could have a coercive impact on the readers. This is especially so when coupled with the claims, in paragraph three, that the union can do nothing about job security, but rather that it depends upon the individual reader's efforts. Those comments can be read as a veiled threat that the presence of the union will harm job security and push the company over the brink.
6. The employer's freedom to express his views does not extend to the use of such threats, promises, or undue influence. Whether that was the employer's intention is irrelevant. The key is the effect on the reasonable employee when the Board evaluates employer conduct so as to determine its effect on the ability of employees to freely express their true wishes in a vote. This is so because of the acknowledged influence of employer statements

upon employees. A freely expressed choice via a vote is fundamental to the policy behind The Labour Relations Act and must be protected. An employer's right to speak cannot be allowed to interfere with that. Where no particular employee is affected adversely by a breach of section 56, the only reasonable means of redressing a violation of the speech limitation is by ordering a new vote or certification without a vote.

7. The Board has said that "an employee is entitled to exercise his freedom of selection free from fears for his job security and/or economic well-being which have been threatened by the employer". (*Lorain Products Ltd.*, [1977] OLRB Rep. 734.) Veiled or implicit threats by an employer going to those matters have been held to be sufficient to set aside a vote, as well. (*Bush Gamble Company Limited*, [1972] OLRB Rep. 644; *Wolverine Tube*, 1963 CLLC ¶16,696; *Bell and Howell Canada Ltd.*, [1968] OLRB Rep. 695; *Robin Hood Multifoods*, [1976] OLRB Rep. 250; *Viceroy Construction Co.*, [1977] OLRB Rep. 562.)

8. I would order a new representation vote.

1877-78-M Carpenters District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 2480, 2482, 1304, 3227 and 3233 of the United Brotherhood of Carpenters and Joiners of America, (Applicant), v. **Harbridge & Cross Ltd.**, (Respondent).

Construction Industry – Parties – Practice and Procedure – Proper parties to an application under section 135 of the Act

BEFORE: R. A. Furness, Vice-Chairman, and Board Members H. J. F. Ade and C. Ballentine.

APPEARANCES: *Douglas J. Wray and Fred Leach for the applicant; S. C. Bernardo for the respondent; A. M. Minsky and J. D. Johnson for the Toronto Building and Construction Trades Council; Lou Castaldo for Labourers' International Union of North America, Local 183; and S. C. Bernardo for the Metropolitan Toronto Apartment Builders' Association and the Carpenters' Employer Bargaining Agency.*

DECISION OF THE BOARD; April 18, 1979

1. The name: "Carpenters District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 3227, 3233 of the United Brotherhood of Carpenters and Joiners of America" appearing in the style of cause of this application as the name of the applicant is amended to read: "Carpenters District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 2480, 2482, 1304, 3227 and 3233 of the United Brotherhood of Carpenters and Joiners of America".

2. The applicant has requested that the Board make a determination under section 135 of The Labour Relations Act with respect to work on a project at 880 Lawrence Avenue East in Metropolitan Toronto.

3. The applicant has adopted the position that the proper parties to this proceeding are the applicant, the respondent and the parties to the collective agreement under which this request has arisen.

4. The Toronto Building and Construction Trades Council (the "Council"), Labourers' International Union of North America, Local 183 ("Local 183"), the Metropolitan Toronto Apartment Builders' Association (the "Association") and the Carpenters' Employer Bargaining Agency (the "Agency") seek to participate in this proceeding. The respondent supports their requests to participate fully in this proceeding by introducing evidence and making argument.

5. It is common ground that the Agency is properly a party to this proceeding. The preliminary question before the Board, therefore, is whether the Council, Local 183, the Association and/or other persons ought to be permitted either to intervene, be added as a party by the Board or otherwise participate in this proceeding under section 135.

6. In representation proceedings before the Board, a trade union or council of trade unions possesses an interest so as to enable it to initiate, respond to or intervene in a proceeding where it has bargaining rights or files evidence of membership with the Board with respect to the employees who are affected by such proceedings. An employer or an employers' organization possesses an interest in representation proceedings to initiate, respond to or intervene where it either has a collective bargaining relationship or is the employer of the employees who are affected by such proceedings.

7. However, section 135 does not contain any reference either to representation, bargaining rights or evidence of membership. Section 135 states:

"The Board shall, upon the application of a trade union, a council of trade unions, or an employer or employers' organization, determine any question that arises as to whether work performed or to be performed by employees is within the industrial, commercial and institutional sector of the construction industry referred to in clause e of section 106."

8. Section 135 clearly indicates who may make an application and refers to "work performed or to be performed by employees". It appears to the Board that the project with respect to which any question arises either with reference to present or future work must form the point of departure in determining which persons have status to participate in a proceeding under section 135.

9. In our view, in order for a person to have standing to participate in a proceeding under section 135 such a person is required to have a direct connection with the project wherein the question arises or will arise. A direct connection is possessed by a person who employs employees who are working or who will work on the project; trade unions or councils of trade unions which have bargaining rights for employees who are working or who will work on the project; and employer bargaining agencies, employee bargaining agencies and affiliated bargaining agents which represent the employers, trade unions or employees previously referred to in this paragraph.

10. On the representations before the Board it appears that the Council and the Association do not have the standing to participate under section 135 and that Local 183 apparently does have status to participate in this proceeding because at the time this application was filed it had bargaining rights for the employees of a sub-contractor who was working on the project at 880 Lawrence Avenue East in Metropolitan Toronto.

11. The Board directs that the applicant, the respondent, the Carpenters' Employer Bargaining Agency, the Ontario Provincial Council, the Toronto Construction Association, General Contractors Section meet with Mr. N. J. Harper, Labour Relations Officer, in order to prepare a list of the persons who are, in their view, to receive notice of this application.

0928-78-R Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees Teamsters Local 647 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, (Applicant), *v. Humpty Dumpty Foods Ltd.*, (Respondent).

Constitutional Law – Employer is a food distributor – certain employees engaged in delivery of product across provincial border – whether under provincial jurisdiction

BEFORE: M. G. Picher, Vice-Chairman and Board Members W. H. Wightman and H. Simon.

APPEARANCES: *Ken Petryshen and Gary Laplante for the applicant; Bruce Pollock, Darrell Walton and George Voisard for the respondent.*

DECISION OF M. G. PICHER, VICE-CHAIRMAN, AND BOARD MEMBER H. SIMON; April 19, 1979

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.
3. Having regard to the agreement of the parties, the Board further finds that all employees of the Respondent employed in the City of Ottawa, Ontario, save and except supervisors and persons above the rank of supervisor, constitute a unit of employees of the respondent appropriate for collective bargaining.
4. The respondent raised an objection to the constitutional jurisdiction of this Board to hear the application. It submits that the labour relations of its employees fall to be regulated under the Canada Labour Code by virtue of section 92(10)(a) of the *British North America Act*, which provides:

“92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next herein-after enumerated; that is to say, –

10. Local Works and Undertakings other than such as are of the following Classes: –

- (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;"

5. The respondent is engaged in the wholesale distribution of snack foods from its warehouse depot in Ottawa. The bulk of the foods which it distributes from that location are manufactured at its plant in Lachine, Quebec; a small part originate with two other snack food producers, one located in Montreal and the other in Toronto. The 19 employees in the bargaining unit sell and deliver the respondent's products to retail outlets in eastern Ontario and western Quebec. Working from the respondent's Ottawa warehouse on a daily basis, three of those employees deliver exclusively in Quebec, three spend about half of their time delivering in Quebec while two others spend 20 per cent of their working time in Quebec. The remainder, being the majority of the respondent's employees, sell and deliver only in Ontario. On the basis of the above figures, on the average, approximately 5 of the 19 employees will deliver product in Quebec on a given day.

6. In a recent decision the Board was required to consider whether an Ottawa dairy which distributed milk and milk products both in eastern Ontario and western Quebec was within the jurisdiction of the Board for the purposes of the labour relations of certain of its driver-salesmen. (*Dominion Dairies Limited*, [1978] OLRB Rep. Dec. 1085. Finding that it had jurisdiction the Board made the following comment on the law as it applies to a commercial enterprise whose products come to be distributed across provincial lines:

"In the past this Board has been required to determine whether a manufacturing operation with trucking facilities would be held to be one undertaking and, if so, whether it would be subject to provincial or federal regulation. When a company operates as a common carrier and its business takes it beyond provincial boundaries its labour relations are exclusively under federal jurisdiction. (*Re Tank Truck Transport Ltd.* (1960), 25 D.L.R. (2d) 161 (Ont. H. Ct.)). Where, however, a company is not a common carrier and the essence of its business is manufacturing or processing, the undertaking is within the constitutional jurisdiction of the province for the purposes of regulating its labour relations, notwithstanding that the goods manufactured or processed by the company are sometimes sold outside the province and that the company's delivery facilities extend that far. In other words, where the activity is essentially one of manufacturing and where the manufacture and delivery of goods are integrated activities which are part and parcel of the company's total undertaking, the labour relations of all employees of the company fall within provincial jurisdiction. (*Wm. R. Barnes Company, Ltd.* [1967] OLRB Rep. Sept. 566; *Domtar Limited Trucking Division* [1970] OLRB Rep. July 495; *Crane Carrier Canada Limited* [1970] OLRB Rep. Sept. 665; *Compagnie Miron Ltee.* [1972] OLRB Rep. Dec. 1034 and [1973] OLRB Rep. Jan. 61; *Mason Windows Limited* [1973] OLRB Rep. Oct. 547; *F.B.I. Foods Ltd.* [1975] OLRB Rep. June 522; *Catalano Produce Ltd.* [1975] OLRB Rep. Oct. 743)."

7. In this case the facts differ slightly in that the bulk of the respondent's produce is processed in Montreal and then warehoused and distributed from Ottawa. In the Board's view that distinction raises no material difference respecting the constitutional jurisdiction of the Province of Ontario to regulate the collective bargaining of the respondent's employees who work exclusively at and out of its wholesale distribution warehouse in Ottawa. The operation of a business within more than one province does not mean that it is necessarily an undertaking that falls within federal jurisdiction within the contemplation of section 92(10)(a) of the British North America Act. As the Judicial Committee of the Privy Council noted, in a different but analogous context, in *C.P.R. v. Attorney-General of British Columbia* [1950] 1 D.L.R. 721 (P.C.):

"There are many companies besides the appellant whose businesses extend over all or most of the Provinces. It was not and could not be suggested that the Parliament of Canada could regulate the hours of work of employees of all such companies."

It is equally true that the BNA Act does not contemplate that the Parliament of Canada may regulate the industrial relations of employees of all such companies, including the industrial relations of the employees of the respondent in this case.

8. For the foregoing reasons the Board finds that it has jurisdiction in this case.

9. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on September 5, 1978, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

10. A certificate will issue to the applicant.

DECISION OF BOARD MEMBER W. H. WIGHTMAN:

1. It is with regret that I must say that I am unable to agree with the result reached in this case by fellow board members.

2. This is an application for certification in respect of certain employees of the respondent located in the City of Ottawa. It initially came before the Board on September 11th, 1978. At that time a dispute arose between the parties as to the description of the appropriate bargaining unit. This dispute centered around eight employees located in six smaller centres scattered throughout the Ottawa Valley. The applicant sought their inclusion while the respondent submitted that they did not fall within the ambit of the appropriate unit for the employees in Ottawa. As a result of this dispute, the Board appointed a Labour Relations Officer to investigate the duties and responsibilities of the employees in question.

3. As the status of employees to be examined could not affect the right of the applicant to certification, the Board granted an interim certificate to the applicant in respect of the respondent's employees in the City of Ottawa with the usual exclusions.

4. Subsequent to the hearing, by letter dated the 23rd day of October, counsel for the respondent raised the issue of the jurisdiction of this Board to entertain the present application in light of the duties and responsibilities of several employees in the bargaining unit for which the interim certificate was granted. Consequently, the Board expanded the scope of the appointment of the Labour Relations Officer to encompass all outstanding issues.

5. We now have the Labour Relations Officer's report before us. As a result of this report, to which the only representations as to accuracy related to some spelling errors, the evidence is not in dispute.

6. The respondent, Humpty Dumpty Foods Ltd. is engaged in the manufacture and distribution of snack food products, primarily potato chips, under the Company's name. As part of this operation the respondent maintains an Ottawa branch. It is this branch which is the subject of this certification application.

7. The respondent employs approximately twenty-nine (29) people in its Ottawa branch. Of these, nineteen (19) are bargaining unit employees falling within ambit of the interim certificate granted. The remaining are either supervisory personnel or office staff. The respondent's operation in Ottawa consists of a small sales office and a warehouse where the goods of the company are stored pending delivery. There is no manufacturing facility connected to the warehouse nor is there any manufacturing facility in the greater Ottawa-Hull area. According to the evidence and the submissions of the respective parties, it appears that approximately 90 to 95 per cent of the products stored and delivered from the respondent's operation in Ottawa are manufactured and produced at the respondent's main production facility located in Lachine, Quebec. The remainder comes from its production facility in Toronto.

8. The employees in the bargaining unit are engaged in the delivery of the respondent's products to its customers in fixed territories according to set routes. From the evidence, it appears that four employees who service small corner variety stores and convenience store chains, such as Beckers, who are classified as driver/salesmen, service customers located entirely within the province of Quebec. They load their vehicles at the warehouse in the morning and then proceed to work exclusively in the province of Quebec. As well, there are two employees, classified as assistant-salesmen who deliver the respondent's products to the major chain store accounts. It would appear that these employees split their working time, on a more or less 50-50 basis, between accounts in the provinces of Ontario and Quebec. Finally, it appears that one employee, classified as a salesman, who is responsible for soliciting orders from the major chain stores, likewise splits his time on 50-50 basis between Ontario and Quebec. In total, seven of the nineteen employees in the bargaining unit in respect of which the interim certificate was granted work either exclusively or substantially in Quebec. In my opinion this most definitely calls into question the issue of this Board's jurisdiction.

9. At the outset of the hearing, counsel for the applicant stated that having fully reviewed the evidence, the applicant was withdrawing its description of the appropriate bargaining unit and agreeing to that outlined in the interim certificate. Quite naturally, the respondent was content with such position. Accordingly, it was unnecessary to inquire into the status of the eight employees in the Ottawa Valley. This left the jurisdiction of the Board as the only outstanding issue.

10. As noted in paragraph 4 of the majority decision the respondent submits that the drivers and or salesmen are engaged in an inter-provincial undertaking within the meaning of section 92(10)(a) of the *British North America Act*. As such the employees are exclusively within the legislative competence of the Parliament of Canada. In my opinion, the respondent is correct in this submission for the reasons I am about to outline.

11. The law in this regard is clear that, *prima facie*, labour relations fall within the legislative authority of the Provinces as coming within section 92(13) of the *British North America Act*. However, it is equally true as a matter of law that the labour relations of any federal work, undertaking or business are within the exclusive jurisdiction of the Parliament of Canada and fall to be governed by the provisions of the Canada Labour Code. The latter is true as a result of section 92(10)(a) of the *British North America Act*.

12. If a company's operations fall within section 92(10)(a) then its labour relations fall within federal jurisdiction and competence. The question revolves around whether or not any given employer's operations fall within the ambit of section 92(10)(a).

13. In assessing this question, the respondent submitted that the "continuous and regular" test laid down by the Ontario High Court in its decision in *Re Tank Transport Ltd.* (1960), 25 D.L.R. (2d) 161 should be the governing factor. I am in agreement with my fellow Board members that this case is limited to the common carrier situation and has no applicability on the facts before us.

14. The applicant relied heavily, in fact almost exclusively on the decision of the Board in the *Dominion Dairies* case [1978] OLRB Rep Dec. 1083. This case involved an application for certification for all employees of the respondent's dairy in the City of Ottawa who were engaged in delivering the company's products. As in the instant case, several of those employees serviced sales routes located partially or exclusively in the province of Quebec. However, in the *Dominion Dairies* situation, the respondent company had a manufacturing facility in the City of Ottawa where the "bulk" of the products delivered by the salesmen were produced. The Board in *Dominion Dairies* stated the issue, at p. 1085 as:

"Whether the trucking and delivery aspect of the respondent's business is sufficiently integrated with its food processing activity as to form part of one undertaking or whether it is severable from the manufacturing component so as to be subject to federal regulation.

It seems to be that such is an accurate statement of the issue in the instant case."

15. In deciding that they had jurisdiction to entertain the application for certification the Board held at page 1087:

"It would strain reality to attempt to describe the Dominion Dairy as engaged in two separate business, one being food-processing and the other being the operation of an inter-provincial trucking business. For the purposes of constitutional law its distribution and delivery function cannot be seen as separate and distinct from its essential undertaking as a dairy. And the fact that the respondent's products are marketed across inter-provincial boundaries does not alter the essential nature of

its business. It is, therefore, not a federal undertaking within the meaning of section 92(10)(a) of the *British North America Act*. For these reasons the Board finds that it has jurisdiction to entertain this application."

This holding was based on a finding that the true nature of the respondent's business was the processing and sale of its dairy products. As such, the result followed a long line of Board jurisprudence.

Wm. R. Barnes Company Ltd. [1967] OLRB Rep. Sept. 566; *Domtar Limited Trucking Division* [1970] OLRB Rep. July 495; *Crane Carrier Canada Limited* [1970] OLRB Rep. Sept. 665; *Compagnie Miron Ltee.* [1972] OLRB Rep. Dec. 1034 and [1973] OLRB Rep. Jan. 61; *Mason Windows Limited* [1973] OLRB Rep. Oct. 547; *F.B.I. Foods Ltd.* [1975] OLRB Rep. June 522; *Catalano Produce Ltd.* [1975] OLRB Rep. Oct. 743.

The reasoning underlying this line of jurisprudence was succinctly summed up by the Board in *Dominion Dairies* case p. 54:

"Where ... the essence of its business is manufacturing or processing, the undertaking is within the constitutional jurisdiction of the province for the purposes of regulating its labour relations, notwithstanding that the goods manufactured or processed by the company are sometimes sold outside the province and that the company's delivery facilities extend that far. In other words, where the activity is essentially one of manufacturing and where the manufacturing and delivery of goods are integrated activities which are part and parcel of the company's total undertaking, the labour relations of all employees of the company fall with provincial jurisdiction."

16. With all the due respect to my fellow members of the Board, I am unable to agree that these cases and this line of reasoning apply to the facts of the present application. It is beyond question that the respondent has no manufacturing facility in the Ottawa area. Almost all the products that are stored at and delivered from the respondent's Ottawa Warehouse are manufactured in Lachine, Quebec. In fact the products are not only delivered to customers across provincial boundaries but are delivered to the Ottawa branch across provincial boundaries.

17. The nature of the respondent's operation in Ottawa is purely and solely distributive. As such the facts underlying not only the *Dominion Dairies* case but also the cases upon which it is premised are not present and consequently the rationale underlying same cannot apply. To hold otherwise, would lead to the conclusion that the labour relations aspect of this operation falls to be governed by the Quebec Labour Code since that is where the manufacturing operations of the respondent are located and the delivery operations are merely incidental to that paramount undertaking. Obviously this cannot be the case where the operation is physically located in Ontario and a majority of deliveries are made in this province. However, it is equally applicable that the converse cannot hold true. A distribution operation which although physically located in Ontario but which is supplied from

Quebec and which supplies customers in Quebec cannot fall under the jurisdiction of Ontario labour relations enactments. It is no doubt situations of this very nature that should and properly do fall to be governed by applicable federal legislation.

18. The issue here is whether the delivery aspect of the respondent's business is integrated with its manufacturing activity as to form part of one undertaking or whether it is severable from the manufacturing component so as to be subject to federal regulation. Here there is no manufacturing component, save for one located in Quebec, with which this delivery operation may be integrated. Here the delivery operation stands alone. It is admitted that the essential nature of the respondent's business is the manufacture and distribution of snack food products. However, merely by holding this to be the case does not preclude certain aspects of the total undertaking of the respondent from falling with federal jurisdiction. (*Regina v. Ontario Labour Relations Board, Ex parte Northern Electric Co. Ltd.* [1970] 2 O.R. 654). I am of the opinion that the delivery function of the respondent's Ottawa Branch is separate and distinct from the total undertaking of the respondent to such an extent as to be severable from the manufacturing component so as to fall within section 92(10)(a) of the *British North America Act* and hence within federal legislative jurisdiction.

19. Accordingly, I am of the opinion that the labour relations aspect of the respondent's Ottawa operation is properly governed by the provisions of the Canada Labour Code and I would dismiss this application.

1979-78-R Teamsters Union Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant), v. **Intermodal Marine Surveys Ltd.**, (Respondent).

Certification – Charges – Membership Evidence – Section 61 – Union suggested that unless employees joined union their employer would no longer be permitted to continue working in the premises of its customer – threat related to job security – conduct intimidating and in violation of section 61 – membership evidence rejected

BEFORE: E. Norris Davis, Vice-Chairman, and Board Members F. W. Murray and W. F. Rutherford.

APPEARANCES: *Ken Petryshen and Don Swait for the applicant; W. J. McNaughton, R. M. Darnbrough and D. Jeffery for the respondent.*

DECISION OF E. NORRIS DAVIS, VICE-CHAIRMAN AND BOARD MEMBER F. W. MURRAY; April 4, 1979

1. The name: "Intermodel Marine Surveys Ltd." appearing in the style of cause of this application as the name of the respondent is amended to read "Intermodal Marine Surveys Ltd."

2. This is an application for certification.

3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.

4. The applicant applied for a bargaining unit consisting of all employees working in Windsor, Ontario save and except foremen, those above the rank of foreman, office and sales staff. The respondent states that the title "foreman" is not used in its organization but that, John Thompson, one of the three employees at its Windsor location is classified as a Supervisor and exercises managerial functions.

5. The respondent's business is to provide a service of inspecting new automobiles to establish their physical condition at the point of their being handed over to a common carrier for transport into the distribution channels. The employees here concerned are employed in that function in the yard of McCallum Transport Co. in Windsor.

6. The respondent by letter to the Board dated March 12, 1979 alleged a contravention of section 61 of the Act by the applicant, and at the hearing took the position that as a result of the manner in which applications for membership were procured, the documentary evidence filed with the Board should be accorded no weight.

7. John Thompson, Supervisor, testified under subpoena that he had been approached by a Mr. Donovan, a representative of the applicant, and a Mr. Goring who was a steward in the employee of McCallum Transport and that this approach took place in the parking lot. According to Thompson, Donovan asked "did I want to sign a card" and explained that the employees of the respondent were non-union members working in a union yard, and that the advantage of joining would be "job protection." which Thompson states he understood to mean "they would bargain for us with the Company". Thompson also states that Donovan indicated that failure to sign a card would mean "there was a possibility that the union would not allow us to work in a union area"; and also that Donovan did make reference to St. Thomas which, according to Thompson, merely confirmed information which Thompson had already received from his Regional Supervisor, Mr. Jeffries that "the union had tried to sign cards in St. Thomas and they had decided not to sign and the company was no longer working at St. Thomas." Thompson also testified that three or four years ago he had been doing the same job when the respondent was performing a similar service in Auto-Haul Co. Transport Yard contiguous to McCallums. Thompson was, at that time approached to join Local 880 of the Teamsters which he refused to do, and that the respondent's employees no longer work in Auto-Haul Yards which in Thompson's understanding was because they were "non-union members".

8. On March 7th Thompson received by mail from the Board notice of the union's application for certification; this mode of service being adopted at the respondent's suggestion due to there being no suitable place for posting at the work place. On March 6th, Jeffries phoned Thompson to advise him an application for certification had been made and to enquire if Thompson had received notice. During this conversation Jeffries enquired if Thompson knew "the other guys had signed cards". On March 7th Thompson phoned Jeffries to advise of his receipt of notice, and some reference was made as to whether Thompson thought he would be out of a job to which Thompson replied in the negative.

9. The following week Thompson testified to a meeting with Jeffries and Jeffries superior, Darnbrough, which took place in a restaurant and, at which, Jeffries and

Darnbrough put the question in several ways as to whether Thompson “didn’t think he would lose his job” with Thompson replying that’s a possibility. The three then returned to the yard and met with Terry Deslippe another employee in the unit, and according to Thompson, Darnbrough and Jeffries put the same questions to him. Deslippe in his testimony however states nothing was asked of him other than whether he had received the notice from the Labour Board. Darnbrough then departed and later that day Jeffries had another discussion with Thompson in which Jeffries wanted to know if Thompson had signed a card and re-covered much of the ground of the morning meeting.

The questions were put to Thompson,

Q. At any time in conversations with Donovan did he say if you don’t sign a card the same thing will happen to you as happened at St. Thomas?

A. No

Q. You have any feeling that you’d lose you job?

A. No

10. Deslippe testified under subpoena, was approached by Donovan accompanied by Goring and Thompson and asked to sign a card and made reference to the fact that he had tried to sign cards at St. Thomas and “that they weren’t working there anymore”. Deslippe testified that he understood from Donovan that if he didn’t sign it was possible he wouldn’t have a job. There was the following testimony.

Q. Did you understand that if you didn’t sign a card you wouldn’t have a job?

A. Yes

Q. That’s why you signed?

A. To keep my job

Q. And if you didn’t you wouldn’t keep your job?

A. That’s what I figure.

11. Thomas St. Croix testified under subpoena. He is the only afternoon shift employee, and that Donovan, in company with Thompson, approached him to sign a card. Donovan pointed out that McCallum was a union shop, that the cars were manufactured in a union shop, and “the three of us were non-union” and “if we were to join the chances of our retaining our jobs would be that much greater”. St. Croix states that Donovan pointed out some of the benefits of belonging such as being part of a bargaining unit, and some one to discuss problems with. St. Croix says no mention was made of St. Thomas. St. Croix testified he had not been pressured to sign and explained that his interpretation of “pressure” was “a direct or indirect threat.”

12. The evidence is clear that in the case of Thompson and Deslippe, Donovan, in some fashion, linked his unsuccessful attempts to organize at the St. Thomas location and the fact that the company no longer operated there, with his soliciting of union membership. It is also clear that the linkage was closely coupled with his suggestion that the refusal of Thompson and Deslippe to join would raise the possibility of a loss of their jobs.

13. It is well established in the Board's jurisprudence that a threatened loss of job is intimidatory and contrary to section 61 of the Act. See the *L.M. Welter Limited* case [1965] OLRB Rep. April 34; *VR/Wesson Ltd.* [1968] OLRB Rep. Nov. 811. While it may be argued that in this case the loss of employment was raised in a qualified manner only as a possibility, in our view the objective conclusion to be drawn is that the linkage to the St. Thomas incident effectively neutralized that qualification and directly coupled loss of job with not signing a union card. This objective conclusion is fortified by the unequivocal evidence of Deslippe who concluded from the total context of the discussions that he wouldn't keep his job if he didn't sign.

14. The Board therefore refuses to accept the documentary evidence of membership filed with this application.

15. The application is dismissed.

DECISION OF BOARD MEMBER W. F. RUTHERFORD:

1. I dissent.

2. All employees appeared on subpoena by the respondent and stated they would not have been present except for the subpoena.

3. Jeffries, the Ontario Regional Supervisor, had told Thompson that Intermodal employees were no longer working in St. Thomas because union employees in the yard were going to refuse to work with them.

4. When Donovan asked the employees to sign a union card and explained what happened in St. Thomas, he was stating a fact not an implied threat. Only one of the three employees stated he felt his job was in jeopardy if he did not sign.

5. Both Carnbrough and Jeffries had a meeting with Thompson to ascertain who had signed cards followed by phone calls by Jeffries to all three employees asking if they had received the green sheets from the Ontario Labour Relations Board.

6. The employees stated that they only spoke to Donovan, the union organizer once while on the other hand the company representative spoke to them several times about the union organizational campaign coupled with an enquiry about the green sheets.

7. I would have found the company in violation of section 61 of the Act and certified the union.

1279-78-R International Leather Goods, Plastics & Novelty Workers' Union, Local 8, (Applicant), v. **Norseman Plastics Limited**, (Respondent), v. Group of Employees, (Objectors).

Certification – Charges – Application under s. 7a granted – employer engaged in a concerted campaign of terror aimed at union supporters

BEFORE: M. G. Picher, Vice-Chairman, and Board Members C. G. Bourne and M. J. Fenwick.

APPEARANCES: *Paul Cavalluzzo and Laura Alper for the applicant; Howard Walton and Walter Fox for the respondent; no one appearing for the objectors.*

DECISION OF THE BOARD; April 5, 1979

1. This is an application for certification. The applicant has requested the Board to grant a certificate pursuant to section 7a of The Labour Relations Act.

2. In its decision dated November 27, 1978 the Board found that all employees of the respondent in the Municipality of Metropolitan Toronto save and except assistant forepersons, persons above the rank of assistant foreperson, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

3. On December 8, 1978 a representation vote was taken among the employees in the bargaining unit. In the result, twenty-eight ballots were marked in favour of the applicant, twenty-eight ballots were marked against the applicant and one ballot, cast by Rosa Sanniti, a person whose employment status is in dispute, was segregated and not counted. The union submits that prior to the vote the employer contravened the Act in such a way that the vote could not reveal the true wishes of the employees. It therefore asks the Board to disregard the results of the vote and certify the trade union by the exercise of its discretion within section 7a of the Act.

4. In this case the Board has heard some of the most disturbing evidence yet recorded respecting the intimidation of employees. Evidence was given by Mrs. Alberta Onyejekwa. She is married, the mother of four children and has been employed as a machine operator by the respondent since June of 1977. The evidence establishes that on November 2, 1978 she declined to sign a petition against the union brought to her at her workplace by Rosa Sanniti. That evening she received an anonymous telephone call at her home. The caller, a man, told her that if she continued to support the union she could be hurt and members of her family could be hurt. She immediately reported the call to the police.

5. On November 6, 1978 Mrs. Onyejekwa was approached at her workplace by Mr. Howard Walton, President of the respondent. He then told her that he was disappointed to learn that she wanted the union. The next day, November 7, 1978, as she was leaving the plant at the end of her shift at 11:30 p.m. she found that the two rear tires of her car had been slashed. The car was parked in the plant parking lot at the time. She immediately reported the incident to the police.

6. Earlier that day she had again been approached by Rosa Sanniti, described by the respondent as a lead hand. Rosa stated that she hoped that Mrs. Onyejekwa was not angry at her for presenting her with an anti-union petition, saying: "When they tell me to do something, I do it whether I like it or not."

7. The evidence establishes that at least three other employees were subjected to similar treatment. Cathy King, a machine operator with the respondent for over two years testified that she attended a meeting in the lunch-room of the plant in October of 1978 at which the company's president, Mr. Howard Walton, stated that he did not want the union in his plant. On November 2, 1978 she too was approached by Rosa Sanniti and was asked to sign a petition against the union. She refused,

8. Mrs. King is the mother of five children between the ages of three and twelve. On November 6, 1978 she received an anonymous telephone call at home. A male caller said that he was aware she had refused to sign the petition and that if she continued to refuse physical harm would come to her. He also stated that she should watch out for her family and children. When she asked the caller to identify himself he simply responded that he was "On the midnight shift" and hung up.

9. Mrs. King's husband immediately called the police. Mrs. King then called the night foreman on duty at the Norseman Plastics plant. She asked the foreman, whom she knew only by the name "Gord", whether he had placed the call, telling him that her children were very upset. The night foreman replied that he would quit before he would do anything like that. He went on to inform her that only a half-hour earlier Mr. Allan Walton, a member of management and brother of the company president, had come into the plant and taken down the names and telephone number of employees.

10. The next evening she received a second anonymous telephone call. The caller reminded her that she had not yet signed against the union and told her to remember her children. She again called the police.

11. Miss Maria Almeida is a machine operator with six years of service with the employer. During the day shift on November 2, 1978 she refused to sign the petition circulated by Rosa Sanniti. At approximately 3:30 p.m. that day she was approached by her foreman, Mr. John Beliriqua. The foreman took her to his office and tried to persuade her to oppose the union. He said that if the union came in things would be worse, that all employees would be paid the same and that they would all have to work harder. She responded that she didn't want to sign the petition. The next day, November 3, 1978, the foreman again approached her and asked her if she had changed her mind. She said that she had not and he answered "You'll be sorry."

12. On the evening of November 6, 1978 Miss Almeida received a telephone call at her home. An anonymous male caller said that if she supported the union he would break her legs. On a day shortly thereafter she was approached at work by Mr. Howard Walton who asked her if she thought the union would do a better job than he did. He stated that she had disappointed him.

13. Mr. Vallabh Bodar worked for the respondent for approximately one year as a quality control inspector. On November 2, 1978 he was approached by Mr. Jim Howison,

his supervisor. Howison asked Mr. Bodar if he was interested in the union and he answered that he was not. The supervisor then said "I don't want a union in my department" and added that any employee who took an interest in the union wouldn't be around in six months. He told Mr. Bodar to pass the message to David Chung, another quality control employee.

14. On Tuesday, November 7th Mr. Howison came to Mr. Bodar's laboratory and told him that management wanted to know if he was still interested in the union. Mr. Bodar replied that he was not interested and didn't want to be asked to sign anything. During the same shift he was approached by Mr. Vitthal Patel, a lead hand, who asked him to sign a petition against the union, saying that the reason for the petition was that the company did not want a union. Mr. Bodar refused to sign.

15. Still later he was approached by Mr. Jasvir Dhami, a set-up man who again urged him to sign Mr. Patel's petition. Mr. Bodar again refused and asked to be left alone.

16. On the same day, November 7, 1978, Mr. Bodar received a telephone call at home. An anonymous male caller said "Are you Vallabh?" He replied that he was. The caller then asked "Do you have a daughter?" and Mr. Bodar replied that he did. The caller then said "Do you want to disappoint her?". When Mr. Bodar replied that he did not, the caller then said "Don't work for the union - stay away!" When Mr. Bodar asked who was calling the man hung up.

17. At approximately midnight on Friday, December 1, 1978, Mr. Bodar was cleaning snow off his car in the parking lot in preparation for going home after his shift. A stranger approached him in the company parking lot, asked him the time and then punched Mr. Bodar in the stomach, knocking him to the ground. The man then kicked him three or four times before running away. Mr. Bodar then went back into the plant and called the police.

18. All of the foregoing events formed the basis of a complaint in support of the application of section 7a of the Act by the applicant. By the agreement of the parties those complaints were withdrawn and a representation vote was taken. In light of further alleged breaches of the Act which occurred after that agreement the applicant revived its request for the application of section 7a, and it is upon those further events that this application must depend. While the Board may not look to those earlier events as establishing a breach of the Act for the purposes of applying section 7a of the Act, those events are nevertheless relevant to the extent that they may give colour and meaning to the subsequent acts of the employer upon which the union relies as establishing breaches of the Act which justify the application of section 7a in its favour.

19. We turn, therefore, to consider the evidence of events which occurred after the agreed withdrawal of the union's complaint, noted in the Board's decision of November 27, 1978.

20. The evidence establishes that on the day prior to the vote Rosa Sanniti circulated among employees in the molding department with a sample ballot upon which an X was marked next to the word "No". As she did so she said to the employees "You know what I mean." The evidence also establishes that on December 8, 1978, the day the representation vote was taken, Mr. Howard Walton circulated among employees on the night shift shortly

before the time at which they were scheduled to vote. He approached them individually and, according to the un rebutted evidence of Mrs. Gladys Dotting, a machine operator on that shift, he said, "You know how to vote, don't you?"

21. A few days prior to that, on the 4th of December, 1978, the company handed out T-shirts bearing the name and logo of Norseman Plastics to all of its employees. While certain foremen, material handlers and lead hands had been issued with T-shirts in the past, the Board accepts the evidence of each of the employees who testified that they had never before been distributed among all of the employees in such a general fashion. A number of employees wore the T-shirts on the day of the vote, when to do so could obviously be interpreted as a statement of support for the anti-union stand of the company.

22. By order of the Registrar all parties were bound to refrain from propaganda and electioneering from midnight of Monday, the 4th of December, 1978 until the completion of the vote. The widespread distributing of company T-shirts for the first time on the day prior to the seventy-two hour silent period in circumstances calculated to have them worn through the silent period and on the day of the vote as signs of allegiance is a contravention of the Act. Having regard to the whole of the evidence the Board is also satisfied that the acts of Mr. Howard Walton on December 8, 1978 and of Rosa Sanniti on December 7, 1978 constitute a breach of The Labour Relations Act. In this regard the Board concludes, upon all of the evidence, that Rosa Sanniti acted on the company's instruction.

23. Section 7a of The Labour Relations Act provides as follows:

"7a. Where an employer or employer's organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit."

24. The issue in these proceedings is whether the breaches of The Labour Relations Act by the company in the week of December 4, 1978 were committed in circumstances such that a representation vote would not reveal the true wishes of the employees respecting their representation by a union. While the Board must focus on that period in time it is obvious in this case that the acts of the employer in the week of the vote cannot be viewed in isolation. The impact on the employees of the company's actions in that week can only be appreciated against the background of earlier events.

25. Those events can only be described as a concerted campaign of terror aimed at employees who supported the union. Firstly there were statements of members of management that would make it clear to any employee that the company would ruthlessly oppose the union and that their job security was on the line. There were statements from the company's president, Mr. Walton, to employees to let them know that he knew and disapproved of their support for the union. There were threats against the physical safety of employees and their children. The admission made by the night foreman raises a reasonable inference

that those threats involved the highest officers of the company. The respondent called no evidence either from the foreman or from Allan Walton to rebut that inference, and having regard to all of the evidence this Board is satisfied on the balance of probabilities that the employer was responsible for the threats and physical intimidation which occurred. The Board is also persuaded that the employees would reasonably have perceived their employer as being responsible for the threats as well as for the beating and tire slashing which followed.

26. Against that background the words of the president of the company on the day of the vote are considerably more than mere passing conversation. The words "You know how to vote, don't you?" repeated personally to employee after employee must be seen as calculated to revive the fear that had been sown in the minds of the employees in the weeks before.

27. Before a decision may be made to grant certification under section 7a of The Labour Relations Act three determinations must be made by the Board. Firstly, the Board must find that the employer has contravened the Act. Secondly, the nature and circumstances of the contravention must be such that the true wishes of the employees are not likely to be ascertained. Lastly, the Board must be of the opinion that the trade union has membership support adequate for the purposes of collective bargaining. (*Re Marques and Dylex Ltd.* (1978), 18 O.R. (2d) 58 (Div. Ct.)).

28. The Board is satisfied that in this case all of those elements have been met. The acts of the employer on December 4, December 7 and December 8, 1978 amount to intimidation and undue influence of the employees aimed at interfering with the rights of the employees to freely select a trade union, contrary to section 56 of The Labour Relations Act. The employer's interference with the electoral process, taking place as it did against the background of threats to employees' jobs and to their physical security and that of their children, was such that the true wishes of the employees are not likely to be ascertained. Having regard to the membership evidence filed in support of this application and to the number of votes cast in favour of the union on the taking of the representation vote the Board is satisfied that at this time the applicant has adequate membership support for the purposes of collective bargaining.

29. A certificate will issue to the applicant.

1911-78-R Peter Bellion on behalf of himself and other employees of Northern Telecom Limited, (Applicant) v. United Electrical Radio and Machine Workers of America (UE) and its Local 531, (Respondent), v. **Northern Telecom Canada Limited**, (Intervener).

Petition – Termination – Evidentiary onus met by applicant – distinction noted between petition filed during certification proceedings and petition filed in support of decertification – petition circulated on company premises and in vicinity of supervisory personnel – petition circulated by known union supporters – no evidence of management influence – vote ordered

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members D. B. Archer and C. G. Bourne.

APPEARANCES: *Michael G. Horan, Peter Bellion and A. Whyte for the applicant; L. C. Arnold, Arthur E. Jenkyn and Gary Lucas for the respondent; F. R. Von Veh, S. McCormack, B. Pollock, G. Shanahan and N. Best for the intervener.*

DECISION OF THE BOARD; April 3, 1979

1. This is an application filed under section 49 of the Act for a declaration that the trade union no longer represents the employees in the bargaining unit. The parties are agreed that this is a timely application pursuant to section 49 of the Act.
2. Under section 49 of the Act the Board is required to ascertain “the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing ... that they no longer wish to be represented by the trade union ... and if not less than 45 per cent have so signified the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.”
3. The documentary evidence filed in support of this application consists of 45 statements of desire each of which shows a number of signatures and bears the following heading:

“Petition

We the undersigned employees of Northern Telecom Limited no longer wish to be represented by United Electrical Radio and Machine Workers of America (UE) and its local 531.”

621 of the 645 signatures affixed to the statements of desire correspond with those of persons coming within the 950 member bargaining unit. The Board also had filed with it in this matter 393 individual statements in favour of the U.E. 171 of these bear the signatures of persons who had earlier signed statements in opposition to the union. Even if these 171 statements of revocation were proven to be voluntary, however, the Board would still be left with the unqualified documentary evidence in favour of the decertification of the respondent union (U.E.) filed on behalf of more than 45 per cent of those in the bargaining unit.

Accordingly, the Board conducted its normal inquiry into the circumstances surrounding the origination, preparation and circulation of the statements filed in support of the application for decertification in order to determine if they represent the voluntary signification of those who signed.

4. The Board heard evidence from 13 bargaining unit employees as to the origination and preparation of the statements in support of the application and the circumstances surrounding the affixing of each signature to the statements. The Board described in the following terms the evidentiary onus which must be met by those asking the Board to rely on statements of desire in *C.C.H. Canada Limited*, [1975] OLRB Rep. Jan. 19, a case dealing with the termination of bargaining rights:

“Therefore, while it is not necessary that there be eyewitness testimony to the actual inscribing of each signature; (see *U.A.W. and Matczynski* [1967] OLRB Rep. Mar. 976 and *Pyrotenox of Canada Ltd.* 60 C.L.L.C. 65) there must be sufficient direct evidence of both the manner of obtaining signatures and the origination of the statements of desire. Thus, it has been said that the ‘omissions in the evidence must inevitably raise questions which detract from the weight to be given to the petitions as being signatories,’ (see *UAW and Watt* [1965] OLRB Rep. Oct. 472.”

In this case the applicant has satisfied the evidentiary onus. The Board has before it first hand evidence of the origination, preparation and circulation of the statements filed in support of the application.

5. The evidence establishes that this application was conceived by Messrs. P. Bellion, A. Whyte and D. Clark who are bargaining unit employees of the company. The latter two employees held office in the respondent union until immediately prior to the circulation of the statements in support of the application for decertification. Messrs. Bellion and Whyte were dissatisfied with the respondent union and decided to seek advice as to decertification. Mr. Bellion contacted the Labour Relations Board Office and was advised to seek legal assistance and was given the names of 3 lawyers. He and the others retained counsel and were advised as to how to proceed. The statements which are before the Board in this matter were prepared by counsel in his office. Messrs. Bellion, Whyte and Clark recruited a number of other employees to assist in acquiring signatures in support of the application. Six of the thirteen employees who took part in the solicitation of the employee body held office in the respondent union until immediately prior to the circulation of the statements. The evidence establishes that the resignations of these six union officials were handed in at the union’s office just 15 minutes before signatures were solicited at the three entrances to the plant at about 6:15 a.m. on Monday, February 19th. As employees entered the plant for the start of the 7:00 a.m. shift on Monday, February 19th they were asked to sign the statement in opposition to the incumbent union. 458 signatures were affixed to the statements between 6:15 a.m. and 7:00 p.m. by employees entering the plant for work on Monday, February 19th.

6. The evidence establishes that the night supervisor, Mr. K. Gilbault, is in charge of the plant until 7:00 a.m. He was at the west gate some time around 6:20 a.m. and was in the vicinity of the west gate on and off until shortly before 7:00 a.m. at which time he announced to those soliciting – “Game over.” At 6:20 a.m. Mr. Gilbault had asked Mr. Whyte

if the employees were distributing union leaflets. Following the October 14, 1976 day of protest the company, while allowing the union to continue to hand out material to employees leaving the plant, had directed the union not to hand out leaflets or other reading material to employees entering the plant. The union was required to distribute material from outside the gate although on occasions union supporters positioned themselves inside the gates when the weather was inclement. Mr. Whyte, who was wearing his union jacket on February 19th, advised Mr. Gilbault that union leaflets were not going to be distributed, that the employees stationed at the door were not engaging in union business – just a petition and further, that he would be given a copy of what the employees were signing after 7:00 a.m. It is not disputed that the foremen who work the day shift came in through the doors where the signatures were being solicited.

7. The evidence establishes that the statements were attached to clipboards with the clip at the bottom of the page so as not to obscure the heading on the documents. Employees were asked to read the preamble and sign the statement if they were in agreement. The Board is satisfied that employees who asked if the purpose of the exercise was to bring in the United Automobile Workers (UAW) were told that while the UAW may be the personal choice of the person soliciting the employees would be able to select a bargaining agent of their choice. Employees who asked if the United Electrical Union (U.E.) officials who were soliciting signatures against the U.E. had resigned their positions with the union were told that they had.

8. The statements which were circulated before the commencement of work on February 19th were returned to Peter Bellion in the washroom at 7:00 a.m. on that day. Other statements remained in the hands of those who were assisting Messrs. Bellion, Whyte and Clark. The evidence establishes that a further 163 signatures were affixed to the statements between February 19th and March 2nd, the terminal date. These signatures, with the exception of three, were obtained during lunch or coffee breaks and immediately before or after work. None of these signatures were acquired during working hours and in no case was a member of management present. The remaining 3 signatures were obtained off the company premises. All of the statements were returned to Mr. Bellion.

9. The respondent union argued that the Board should not accept the signed statements as evidence of the voluntary wishes of those who signed. Counsel reminded the Board that the test must be an objective one and on the basis of an objective assessment asked the Board to conclude that statements signed on company premises, in a manner prohibited to the union and with the supervisory staff in the vicinity, as was Mr. Gilbault, must have caused the employees who signed to have concluded that management approved and lent its tacit support to the campaign. Counsel cited cases in which the Board has refused to accept as voluntary statements of desire where the circumstances surrounding their circulation were such as to cause a reasonable employee to conclude that management had lent at least tacit support and might therefore be involved. He argued as well that the failure of the U.E. officials who were involved in the campaign to resign in advance of the circulation of the statements and the decision to have at least one U.E. official at each door, and the decision of Mr. Whyte to wear his U.E. jacket must be viewed as evidence of an attempt to deceive the employee body. In this regard he relied on the evidence of those witnesses who testified they had not read the preamble to the statements but had assumed it was in support of the union.

10. The Board distinguished between an employee statement in opposition to a union's application for certification on the one hand, and an employee statement in support of decertification on the other in *N.J. Spivak Limited*, [1977] July OLRB Rep. 462 wherein at para. 6 the Board stated:

"In contrast to a statement filed in opposition to an application for certification a statement of desire filed in support of a termination application under section 49 of the Act does not represent a sudden change of heart by those who sign it. The operation of section 49, a section designed to give vent to employee desires, requires the passage of at least one year from the date of the union's certification before the Board will entertain an application for termination of bargaining rights. Because of the absence of an immediate change of heart, as happens when an employee signs himself into membership in a trade union and shortly thereafter signs a statement in opposition to the certification of the same union, and having regard to the purpose of section 49, the Board is less inclined to draw inferences adverse to the voluntariness of the statement filed in support of an application under section 49 of the Act."

(See also re *William Scott*, Board File 0419-77-R, August 12, 1977.) In this case we are dealing with a statement in support of an application for decertification. There has been no sudden change of heart by the employees who signed the statement. The respondent union has had a bargaining relationship with the company at this location for over 10 years.

11. The Board is satisfied that this application was conceived by and the procedures in support of it were carried out by bargaining unit employees motivated by a desire to replace their existing bargaining agent with another. The Board is further satisfied that the employer was not involved in this matter. Notwithstanding the lack of direct employer involvement, the Board has found in other cases that a statement of desire signed in circumstances where a reasonable employee might conclude that management was involved (i.e. where it appears on an objective assessment that the statement is being circulated with management support and approval) does not represent a true expression. Having regard to the responsive nature of the employer/employee relationship, the Board has found in these cases that a statement signed in circumstances where an employee might reasonably fear that management would become aware of who signed and who did not, does not reflect the true wishes of those signing (see re *Morgan Adhesives Ltd.* [1975] OLRB Rep. Nov. 845). The Board must decide if the signing of this statement on company premises and with supervisors in the general vicinity on the morning of February 19th was done in circumstances as would cause a reasonable employee to conclude that management was involved and might become aware of who signed and who did not. If the Board makes this finding it would make the further finding that the statement does not represent the true wishes of those who signed.

12. In this case the circulation of the statement inside the plant gate on February 19th must be viewed in light of the fact that union literature was frequently disseminated on company premises (albeit outside the plant doors on most occasions). The employees of this company frequently received union literature on company premises. Although the persons who handed out the literature on behalf of the union were on company premises with the

permission of the company there is no suggestion that the employees ever viewed the leaflets or other literature as company inspired or vetted. The petitioners in this case positioned themselves inside the gate for a single 45 minute period. The inference which the union asks the Board to draw would be an easier one to make if the plant gate campaign had extended over a number of days or had been conducted at a time when there was more than a single management person on the premises. More importantly, however, the inference which the union asks the Board to make must be made in the knowledge that recognized trade union supporters were stationed at each gate. Messrs. Whyte, Clark, Manuel, O'Connor, Cann and McAulay were known to the employees as trade union supporters and not as agents of management. Indeed, the respondent union argues that the Board should disregard the statements in support of the application because employees may have been misled by the presence of these persons into thinking the documents were union documents. The circulators told those who asked that they would be free to choose a new union should the U.E. be decertified and never suggested that the plant would be left without union representation. While the employees entering the plant on February 19th may have assumed that the circulators had obtained permission from management to be inside the gate, which they had not, we are not prepared to conclude that these employees would also have assumed in this case that management was involved in and supported the circulation of the statements and would likely become aware of the names of those who signed and those who did not. In the absence of any sudden change of heart the Board is not prepared to conclude in these circumstances that employee freedom of choice in this matter was impaired by virtue of the statements being circulated on company premises and, on the morning of February 19th, at a time when the night supervisor was in the vicinity.

13. The three line preamble to each statement filed in support of the application makes it clear that those who sign no longer wish to be represented by the United Electrical Radio and Machine Workers of America (U.E.) and its Local 531. The evidence shows that the statements were attached to the clipboard at the bottom of the page so as not to obscure the preamble and employees were asked to read it. In these circumstances the Board can come to no other conclusion than that those who signed did so because they no longer wished to be represented by the U.E. The failure of those who circulated the statements to resign their union posts prior to February 19th, while obviously a matter of great concern to the incumbent union, does not alter the result.

14. The Board is satisfied on the basis of all the evidence before it that not less than forty-five per cent of the employees of the intervener in the bargaining unit, at the time the application was made, have voluntarily signified in writing that they no longer wish to be represented by the respondent union as of March 2, 1979, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent union under section 49(3) of the said Act.

15. A representation vote will be taken of the employees of the respondent engaged in the manufacture of Central Office Switching Equipment in the Regional Municipalities of Peel and York, save and except those employed in the repair and distribution of communications and related equipment, section managers, persons above the rank of section manager, registered nurses, stationery engineers and office staff, on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

16. Voters will be asked to indicate whether or not they wish to be represented by the respondent in their employment relations with the intervener.

17. The matter is referred to the Registrar.

1097-78-R United Steelworkers of America, (Applicant), v. H. Paulin & Co. Limited, (Respondent).

Appropriateness – Bargaining Unit – Factors considered by Board in determining that a division within a corporation not appropriate for collective bargaining

BEFORE: Rory F. Egan, Alternate Chairman, and Board Members D. B. Archer and C. G. Bourne.

APPEARANCES: *Lorne Ingle, Q.C. and Mary Shane for the applicant; Roy C. Filion, Harry Freedman, A. Paulin and R. Paulin for the respondent.*

DECISION OF THE BOARD; April 26th, 1979

1. The name “H. Paulin and Company Limited” appearing in the style of cause of this application as the name of the respondent is amended to read: “H. Paulin & Co. Limited”.

2. This is an application for certification in which the applicant applied to be certified for all employees of H. Paulin & Co. Limited. An Examiner was appointed to inquire into the composition of the bargaining unit, including the schedules filed by the employer and the community of interest of employees on the schedules.

3. Underlying the dispute which necessitated the appointment of the Examiner was the contention of the respondent that its employees comprised a single bargaining unit. The applicant, on the other hand, maintained that there were two potential bargaining units – one made up of employees of H. Paulin & Co. Limited and the other of employees of Capital Metal Industries. The applicant seeks bargaining rights in a proposed unit made up of what it argues are employees of H. Paulin & Co. Limited only.

4. The evidence shows that at one time there were two separate companies working out of the same location. In 1972 H. Paulin & Co. Limited became a public corporation and Capital Metal Industries became a wholly-owned subsidiary. In 1973 Capital Metal Industries became a division of H. Paulin & Co. Limited and it remained a division of that company at the date of organization.

5. In addition to the Capital Metal Division, there are a number of other divisions of H. Paulin & Co. Limited, making a total of nine.

6. A chart (Exhibit 1) was filed with the Examiner and produced at the hearing. The Report contains the following explanation of Exhibit 1:

This chart outlines the different locations of the operations. The operation on Milne Avenue has four divisions. It has the industrial fasteners division, marked number one, the automotive after-market division, marked number two, the cold heading operation, marked number three, the metal stamping division, marked number four, and a separate building on Butterworth is a division called Long Lok of Canada, division number five. On Mack Avenue we have division number six, which is brass fittings; division number seven, which is non-ferrous fasteners, and division eight, which is the screw machine, and on Birchmount we have division number nine, which is the consumer products division. Each of these divisions represents the total sales of the company, so for the purpose of sales reporting each of these divisions have a separate sales analysis and combined, become the total sales of the H. Paulin & Company.

7. It emerges that there are four separate buildings involved in the enterprise. These are situated on Mack Avenue, Milne Avenue, Butterworth Avenue and Birchmount Avenue respectively.

8. The divisions to which reference has been made are distributed between the above buildings. Those which the applicant seeks to include in its bargaining unit are numbered 1, 2, 6, 7 and 9. The divisions referred to for the sake of convenience, as the Capital Metal divisions, are numbered 3, 4 and 8 on the chart. The further division is called Long-Lok and is assigned the number 5 on the chart.

9. The bargaining unit for which the applicant has applied comprises persons employed in different buildings. Divisions 6 and 7 are on Mack Avenue. Divisions 3 and 4 are on Milne Avenue. Division 9 is at Birchmount and 5 at Butterworth. Mack Avenue also contains division 8 which includes persons the applicant does not seek to represent. Milne Avenue contains divisions 3 and 4 which the applicant does not seek to represent.

10. The divisions referred to above are also referred to as sales divisions and might better be termed cost centres.

11. The evidence establishes that there is an interchange of products and parts thereof between the divisions and that the business is so organized that it requires this flow for the purposes of manufacture, assembly and sales. There is also evidence of the movement of persons between the divisions both on a permanent and on a part-time or temporary basis. The temporary moves may vary between an hour to a week at a time or more. Frequently, employees of one division, including those referred to as Capital Metals, move into the other areas for the use of certain manufacturing machines and for delivery of parts. There is no temporary transfer of foremen. But in the Mack plant, the foreman of division 8 is also the foreman of divisions 6 and 7 in the same building.

12. There is one personnel department covering all employees and one payroll department. With respect to the latter, one of the distinctions upon which reliance was placed by the applicant is that Capital Metal Division employees and those who work in the other divisions are paid on alternate weeks. In addition, there is a difference in that one group is paid by cheques showing the name "Capital Metal Industries", whereas the other group gets

cheques showing "H. Paulin & Co. Limited". The cheques are, however, drawn on the same bank account. There is also a different policy in force with respect to wage increases. Annual for Capital Metal employees and semi-annual for Paulin employees. The present arrangement was said to be to enable the company to reduce the amount of funds going out on the same day.

13. There is one janitorial staff comprising five employees that do all the work on all the grounds. Four are paid by Paulin cheques and the other by Capital Metals.

14. There is a tool shop which provides tools and dies for the manufacturing operation. It falls under Capital Metals division but does maintenance work throughout the whole operation.

15. The security for the total company is handled by the General Manager of the Capital Metals division.

16. Statutory holidays are the same throughout the enterprise as are OHIP, group life insurance and a dental plan. The evidence is not clear as to what category of employees is covered by the pension plan but indicates that if any people in the unit are covered, then all are.

17. There is a preponderance of skilled people in Capital Metals. In the other areas there are a few jobs that are more skilled than others but they are not skilled jobs in the same sense as the term is used with respect to Capital Metals.

18. There is also a difference in the hours of work between people employed in the Capital Metals divisions and those in the Paulin divisions.

19. Clearly, there are areas of differences between those employees who work in the divisions under Capital Metals and those who fall into the Paulin divisions, as we have called them for the sake of convenience. The concentration of skilled trades with their correspondingly higher rates in the Capital Metals Division combined with the different hours of work and the fact that the employer makes a distinction with respect to the form of the pay cheque, thus indicating, at least to the employees, some distinction between the divisions, all militate in favour of the position taken by the applicant.

20. On the other hand, the evidence makes it clear that too much emphasis ought not to be placed on the work "division" as suggesting some kind of separate entity. The divisions are as observed earlier, really cost areas, and arise more for the control of sales than for division of functions.

21. Apropos the above, the Board, in determining the appropriate bargaining unit, has to keep in mind, among other matters, that it is in fact dealing with one corporation, H. Paulin & Co. Limited, to which the divisions belong.

22. As we have said, there are discernible differences between the groups of employees. On the other hand, it is very obvious that we are dealing with a wholly-integrated operation involving product flows, intermingling of divisions within buildings and the employees in those divisions. There are temporary transfers from division to division and the operation

of machinery situated in one division by employees from another division. The fringe benefits are the same throughout and the whole personnel operation falls under the direction of a single department. Not only is that the case, but the bargaining unit which the applicant is seeking is divided among the various plant buildings which, as already noted, would mean not only separation for members in the unit but also intermingling with employees who would be excluded from the unit sought. The viability of such a unit is extremely doubtful.

23. On the basis of all of the evidence in the Report of the Examiner and after giving careful consideration to the argument of counsel on behalf of the parties, the Board finds that the appropriate bargaining unit is that proposed by the respondent.

24. The Board is further satisfied on the basis of all the evidence before it that less than forty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on October 6, 1978, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

25. The application is accordingly dismissed.

1277-78-R International Molders & Allied Workers Union, Applicant, v. Riverdale Frozen Foods Limited, Respondent.

Certification – Charges – Practice and Procedure – Application under s. 7a granted where employer threatened job security and confused employees with respect to membership support enjoyed by Union – Particulars filed 8 days after union became aware of conduct – employer sought to have Union prevented from leading evidence – failure to file particulars earlier did not cause an adjournment nor did it prejudice or embarrass the employer nor did it cause unnecessary expense or delay – union permitted to proceed with charges

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members D. B. Archer and C. G. Bourne.

APPEARANCES: *Laurence Arnold, Murray Hart and Edward C. Witthames for the applicant; D. Churchill-Smith, L. Bertuzzi, and R. Ondrusek for the respondent.*

DECISION OF THE BOARD; April 2, 1979

1. The Board issued a decision December 1, 1978 in this application for certification in which it found that the applicant was a trade union within the meaning of section 1(1)(n) of The Labour Relations Act and represented not less than forty-five per cent of the respondent's employees in a unit of employees found to be appropriate for collective bargaining purposes. That unit is described in the decision as "... all employees of the respondent at Niagara Falls, Ontario, save and except foreman, persons above the rank of foreman, office

and sales staff and persons regularly employed for not more than 24 hours per week, ...". The applicant claimed that three persons, Vera Gauthier, Jean Lombardi and Domenic Marzano performed managerial functions within the meaning of section 1(3)(b) of the Act and should not be included in the unit. As a result, the Board appointed an Examiner to inquire into their duties and responsibilities.

2. The applicant withdrew its challenge to Jean Lombardi during the inquiry. The Board subsequently received the Examiner's report and heard the submissions of the parties as to the conclusions which the Board should draw from the report. Having reviewed the report and considered it fully along with the parties' submissions, the Board finds that there is no evidence whatsoever to support a finding that either Gauthier or Marzano exercise managerial functions within the meaning of the Act. The Board finds, therefore, that Vera Gauthier, Jean Lombardi and Domenic Marzano are employees for purposes of this application.

3. During the hearing giving rise to the Board's December 1st decision, the respondent requested the Board refuse to consider allegations of employer misconduct made by the applicant on the grounds that it had failed to comply with the duty of promptness under section 47(2) of the Board's Rules of Procedure. The allegations had been filed in support of a request of the applicant for certification without a vote under section 7a of the Act. In that hearing, the Board first dealt with those matters leading to the findings referred to in paragraph 1 above. Next it dealt with the threshold issue of the applicant's jurisdiction to accept employees of the respondent into membership and reserved its decision thereon. The parties advised the Board, in that process of receiving their representations on the issue, that the applicant would be seeking adjournment of the hearing when the representations were completed. The respondent did not oppose the request, so it was granted and the hearing was adjourned without hearing the parties' argument on the issue of promptness. Since the Board's December 1st decision denied the membership challenge, the application was scheduled for further hearing. Upon continuation, the Board heard the parties' argument in respect of the respondent's request that the Board refuse to allow the applicant to adduce evidence on its allegations of employer misconduct. The Board, having considered these arguments, ruled at the hearing to deny the respondent's request. Since the respondent asked for the Board's reasons in writing, the Board now provides them.

4. The application was first heard on a Monday. The allegations were filed the prior Thursday by letter, hand delivered to the Board. Respondent counsel received a copy of the letter from the Board in the latter part of Thursday afternoon and immediately filed a letter in reply protesting the lack of promptness in filing and the lack of particulars. Particulars were filed by letter the next day, Friday and received late that afternoon by respondent counsel. Eight clear days had elapsed between the event giving rise to the allegations and their filing with the Board. The object or purpose of the requirement for prompt filing of allegations of improper conduct as set out in section 47(2) of the Board's Rules of Procedure is to avoid prejudice, delay or embarrassment to the parties involved with the hearing and processing of applications under the Act. In this regard see the Board's decision in *Fleck Manufacturing Ltd.*, 62 CLLC ¶16,236. While it is possible in the instant case that the allegations could have been made earlier, the timing of their filing did not of itself lead to an adjournment, nor did it cause prejudice, embarrassment or unnecessary delay or expense to the respondent. Accordingly, the applicant was allowed to adduce evidence as to the allegations contained in its two letters filed with the Board in support of its request for certification under section 7a.

5. The facts in this case are derived from the evidence of the three employees of the respondent who appeared as witnesses for the applicant. The respondent did not call any witnesses.

6. On November 7, 1978, the day following the posting of the Board's customary notice to the employees about the application, the respondent held a series of meetings with all of the employees at work that day in groups of ten to fourteen employees. These meetings were held during working hours in the office of Bob Ondrusek, an owner of the respondent. While the Board heard evidence with respect to only three of these meetings, it may be inferred reasonably from the uncontradicted evidence of the three witnesses that the circumstances of the other meetings were the same or very similar. Employees did not lose pay for the time spent in the meetings which lasted for approximately one-half to one hour. The respondent was represented by Bob Ondrusek, Rudi Ondrusek (another owner) and by its accountant who is not employed by the respondent. At a point in each meeting, the Ondruseks withdrew and left the employees with the accountant.

7. Bob Ondrusek started each meeting with reference to the employees attempting to "get a union in". They were told that the respondent could not afford to pay the employees any more money if the applicant was certified. Comments were made about unexpected expenses which had been met, the bank mortgage on the plant and the dollar amount of product shipped (i.e., sales) and net profit in 1977 and for 1978 to date of the meeting. In respect of sales and net profit respectively, the figures given were approximately \$3 million and \$12,000 for 1977 and \$2 million and \$1,600 for 1978. Ondrusek told the employees that, even if the union got in, the respondent would do everything possible to keep the operation going until the bank padlocked the plant doors. Ondrusek also suggested to the employees that they could form a shop committee for dealing with the respondent and thus not have to pay union dues.

8. After the Ondruseks withdrew from the meeting, the accountant produced records for the employees which he referred to as the respondent's books. He also presented to the employees two documents which the witnesses described as petitions, one bearing a statement in favour of the application and the other in opposition to it. These were presented in a manner which was intended to convey the impression that the documents were part of documentation received from the Board. The employees were told that they had to sign one or the other before leaving the meeting. When the witnesses objected to signing either they were told that they would have to sign before 4:00 p.m. that day because the forms had to be mailed that evening. None of the witnesses signed, but they testified that they saw other employees sign and observed others decline to do so. The evidence supports the finding, also, that these documents were presented in a manner suggesting a preference for the employees signing the one in opposition to the application.

9. There was no evidence of how many employees signed either of these statements, but at the end of the day a "notice to all employees", signed by the Ondruseks and bearing the text set out below was posted:

"The management of Holiday Farms would like to thank all employees who have signed in opposition to the application for union certification of the International Molders and Allied Workers Union.

Well over 70% of employees have signed in opposition to the union, others who have not signed can be assured that the company does not plan to do anything regarding their employment as they are free to be undecided. The company will cooperate in the formation of an employee's association with freely elected committee members to discuss any grievances or problems on any employees behalf."

The Board notes that the schedules filed by the respondent with its reply indicate that there were 88 employees in the bargaining unit.

10. No promises were made to the employees of improvements being made to pay or benefits if the union was not certified or threats of them being reduced if it was certified. There was no interrogation of the employees about their union membership.

11. Section 7a of the Act operates as a deterrent to employers unlawfully interfering with employees' efforts to be represented by a trade union. As well, it provides an effective remedy where such employer intervention would serve to destroy the free selection of a bargaining agent, a right guaranteed by the Act. The section provides as follows:

"Where an employer or employer's organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit."

See the Board's decision in *Ex-Cell-O Wildex*, [1977] OLRB Rep. July 466 for a review of the place section 7a has in the scheme of the certification procedures under the Act.

12. Three conditions must exist before the Board will exercise the discretion which section 7a accords it:

1. The respondent must have contravened the Act.
2. The contravention must have resulted in a situation where a secret ballot is unlikely to ascertain the true wishes of the employees.
3. The applicant must have membership support (in the bargaining unit found appropriate by the Board) adequate for collective bargaining purposes.

The responsibility rests with the trade union seeking automatic certification under this section to demonstrate on the balance of probabilities that the events on which the union is relying have created a situation where the true wishes of the employees are unlikely to be ascertained in a secret ballot. In this respect the Board has stated in *Winson Construction Limited*, [1976] OLRB Rep. Nov. 714,

“No general rules can be set down as to what circumstances might justify a conclusion that employee desires are not likely to be ascertained in a representation vote. Rather, each case must be decided on its own particular facts.”

13. In the case at hand, the first task of the Board is to determine whether there has been a breach of the Act. The applicant argues that the respondent's conduct constitutes a breach of sections 56, 58(c) and 61. The purpose of section 56 of the Act is to protect the rights of employees to form or select trade unions to represent them free from interference from their employers and the section reads as follows:

“56. No employer or employer's organization and no person acting on behalf of an employer or an employer's organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.”

14. The following actions of the respondent, in this Board's view, constitute undue interference with the formation and selection of a trade union in contravention of section 56 of the Act:

1. holding, in the midst of a union organizing campaign, 'captive audience' meetings with its employees during which, amongst other things, it has attempted to elicit from the employees an indication of their support or opposition to the application for certification;
2. intermingling, in the meeting, statements about the respondent's marginal financial circumstances and its inability to pay more money if the union got in with statements that the respondent would do everything in its power to keep the business going until the bank pad-locked the doors;
3. representing the statements which it was seeking to have the employees sign as having come from the Board; and
4. posting the notice referred to in paragraph 9 above caliming 70% of the employees not to be in support of the application and expressing the respondent's readiness to co-operate in the formation of an employees' association.

The Board finds that, by these actions, the respondent has crossed well over that fine line between the employer's freedom under section 56 to express his views and the limitation that, in so doing, he not use coercion, intimidation, threats, promises or undue influence.

15. It is not as readily evident, however, if the respondent's contravening of section 56 makes it unlikely that the true wishes of the employees will be ascertained in a secret bal-

lot. It is a fact that the respondent has not expressed promises or threats to the employees. The Board has no doubt, nonetheless, that the effect of the respondent's remarks referred to in item 2 of paragraph 14 above constitute an implied threat to the job security of the employees. The message is clear, if the union gets in, ultimately the doors of the respondent's plant would be padlocked. Therefore, if a vote were to be directed, the employees would be faced with the prospect that a vote for the applicant would be a vote for the ultimate loss of all jobs in the plant.

16. The Board is concerned also with the attempt to misrepresent the documents which the employees were being asked to sign as having come from the Board and having to be returned to the Board. Regardless of what might have been the respondent's intention, the effect of its efforts would be to confuse the employees as to what purpose the Board would have for these indicators of membership support as contrasted with the membership applications which some of them had signed previously. When this conduct of the respondent is coupled with the posting of the notice telling the employees that 70 per cent of their number were opposed to the application for certification, their confusion as to the support for the applicant is compounded.

17. The nature of this contravention of section 56 is such that it is also a contravention of section 58(c) and section 61 of the Act.

18. Having regard to the Board's findings that there has been an implied threat of loss of job security and that the respondent's conduct, in respect of the documents which it sought to have the employees sign, would have the result of confusing the employees about the support enjoyed by the applicant, the Board further finds that the nature and extent of the respondent's interference in the formation or selection of a union has been such that the true wishes of the employees would unlikely be disclosed by a representation vote.

19. Respondent counsel argued in the hearing that the allegations and particulars filed by the applicant did not contain any threats regarding loss of job security, therefore that was not a material fact, if proven, that the Board should consider. The applicant's allegations contained reference to the alleged fact that, in the November 7th meeting, management representatives of the respondent advised the employees "that the company's financial position was precarious and that the employees could expect to receive no more money with the union than they could expect to receive without a union". Considering all of the circumstances of the meeting, the intertwining of the respondent's comments about its financial straits with those about keeping going until the bank padlocks the doors, the Board considers the threat of loss of job security to be inextricably linked to the applicant's allegations quoted above and therefore to be relevant, admissible and proper for consideration in reaching findings of fact and conclusions thereon.

20. The Board is satisfied from all of the evidence before it, including the evidence that more than 45 per cent of the employees are members of the applicant within the meaning of the Act, that, on the date hereof, the applicant has membership support in the bargaining unit adequate for collective bargaining purposes.

21. The Board considers that the particular circumstances of this case make it an appropriate one in which to exercise its discretion under section 7a and grant the applicant's request for certification without holding a representation vote.

22. A certificate will issue to the applicant.
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1958-78-R Labourers' International Union of North America, Local 837, Applicant, v. **Robertson-Yates Corporation Limited**, Respondent, v. Operative Plasterers' and Cement Masons' International Association, Local 598, Intervener #1, v. International Association of Bridge, Structural and Ornamental Ironworkers Local 736, Ironworkers District Council and The International Association of Bridge, Structural and Ornamental Ironworkers, Intervener #2.

Bargaining Unit – Construction Industry – Practice and Procedure – Description of bargaining units by trade or craft and not by work performed – no need to specifically exclude other trades or crafts from bargaining unit description – exception noted in relation to operating engineer bargaining units

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members H. J. F. Ade and O. Hodges.

DECISION OF THE BOARD; April 5th, 1979

1. In its decision issued March 16, 1979, the Board certified the applicant as bargaining agent for all construction labourers employed by the respondent in Board Area #5. The Board, in reading its decision, had considered the representations contained in the two interventions but did not refer to them in the decision. Their representations were as follows.

Intervener #1

"The Intervener represents, pursuant to a Provincial Bargaining Agreement, the Cement Masons in the employ of the Respondent. The Intervener has intervened for the purpose of ensuring that Cement Masons in the employ of the Respondent are not included in the Bargaining Unit applied for."

The intervener was not seeking a hearing.

Intervener #2

The intervener requested a hearing of the application by the Board and supported its request by the following submission

"The bargaining unit should be described in such a way as to make it clear that it excludes all Rodmen and all employees performing work covered by the Intervener's Collective Agreement and by the Intervener's Designation concerning rodwork."

2. It is clear from the interveners' failings that they were not seeking to represent construction labourers, the trade for which the applicant was seeking certification. Rather they were seeking properly to assure that the applicant's bargaining rights were described in a way which would not infringe on the bargaining rights which the interveners claimed by virtue of their respective collective agreements. Intervener #2 was seeking also to have the bargaining unit described to make it clear that rodmen and rodwork were excluded.

3. Having regard to the fact that the applicant was seeking certification to represent construction labourers and not cement masons or rodmen, and having regard further to the Board's consistent and long-term practice of describing bargaining units in the construction industry by reference to trades or job classifications and not by the work performed, the Board considered that the interests of the interveners were not at risk. For these same reasons, the Board deemed it unnecessary to hold a hearing as requested by intervener #2, a discretion the Board has under section 91(13) of the Act.

4. The Board has now received letters from counsel for both interveners requesting reconsideration of its decision. While the reasons given by each intervener for requesting reconsideration are worded differently from the reasons given for intervening, the combined effect of each intervention and the reconsideration request is that each intervener seeks to have the Board's decision worded so as to exclude the trade they represent and the work for which they claim jurisdiction. The means proposed by each for achieving this differs. Intervener #1 wants the decision to "... note that construction labourers does not include Cement Masons, or work performed by Cement Masons.", while intervener #2 asks the Board to achieve this purpose by "... specifying in its decision that any certificate issued is subject to the existing certificates and collective agreements ...". Intervener #1 also seeks a hearing if the Board does not amend its decision.

5. As already noted above, the Board's practice over many years, when dealing with the construction industry, has been to describe units deemed appropriate for collective bargaining purposes in terms of trades. This practice gives recognition to the tradition in the industry of representation along craft lines. One effect of this practice is to eliminate any need for referring to other trades in the exclusions from the unit being described. As in the case at hand, since the Board is certifying a unit of construction labourers, there is no need to specify that the unit does not include cement masons or rodmen, or for that matter any other trade or employees covered by any other collective agreement with the respondent. At the same time, the Board declines to describe units in terms of the work performed by the employees whom the applicant seeks to represent so as to avoid interfering with established work jurisdiction practices. The one exception to this in the construction industry is in respect of units of operating engineers where the Board's practice is to describe the unit in terms of the kind of equipment which they operate. There is nothing in the interveners' submissions to cause the Board to vary from these customary practices in describing the bargaining unit in this case.

6. For the above reasons, the Board does not deem it advisable to amend, vary or revoke its decision in this matter.

1786-78-R Canadian Food and Allied Workers Union Local 725 chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC, Applicant, v. Peoples, Division of **St. Michael Shops of Canada Limited**, Respondent.

Certification – Charges – Section 61 – Employer alleged improper conduct by union – intimidation charges properly raised by employer – anti-union petition destroyed because of intimidation by union supporters – vote ordered

BEFORE: Pamela C. Picher, Vice-Chairman and Board Members J. D. Bell and O. Hodges.

APPEARANCES: *Douglas J. Wray and Joe O'Donnell for the applicant and R. C. Fillion, S. Brassard and M. Delage for the respondent.*

DECISION OF PAMELA C. PICHER, VICE-CHAIRMAN, AND BOARD MEMBER J. D. BELL; April 30, 1979

1. The name "Peoples Department Stores Limited" appearing in the style of cause of this application as the name of the respondent is amended to read: "Peoples, Division of St. Michael Shops of Canada Limited".
2. This is an application for certification.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.
4. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent at Hearst, Ontario, save and except the assistant manager, management trainees, one secretary to the manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.
5. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on February 14th, 1979, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.
6. Counsel for the respondent company argued that notwithstanding the fact that there is membership evidence in excess of fifty-five per cent, the Board should exercise its discretion under section 7(2) of the Act and order a vote to ascertain the true wishes of the employees. Counsel argued that prior to the terminal date the employees in the bargaining unit were subjected to intimidating tactics in violation of section 61 of the Act. The use of these tactics, according to counsel, raise a doubt as to whether the applicant did in fact enjoy the support of more than fifty-five per cent of the employees in the bargaining unit.
7. By way of objection, counsel for the applicant union argued that the employer

lacked status to make these charges. Counsel contended that there are avenues available to employees to make complaints before the Board and in the absence of a complaint filed by the employees themselves, the Board should decline to hear these allegations from the employer. Several cases were cited to the Board in support of the applicant's position. (See *Magna-Cote (Division of Magna International Inc.)*, [1978] OLRB Rep. May 433; *Bargain Hunter Press*, [1975] OLRB Rep. Nov. 805; *Rexdale Heating Limited*, [1974] OLRB Rep. March 115 and *LRB (Can) v. Transair Ltd. et al*, 76 CLLC 14,024).

8. These authorities, however, do not stand for the proposition that a party to a certification proceeding may not bring forth evidence which might raise a doubt as to the reliability what otherwise appears to be acceptable membership evidence. In an application for certification the Board relies on hearsay evidence in determining the membership support of an applicant union. It is not feasible for the Board to hear from each individual who signed a card to ascertain his true wishes or inquire into the circumstances under which he signed a membership card. For this system to operate effectively the Board must consider any substantial allegation which might cause the Board to doubt the reliability of the membership evidence. To insist that employees alone may raise allegations of intimidation by a union would create an anomalous situation. The more effective the intimidation might be the less likely the Board would be to hear of the violation as its continuing effect could deter the employees from lodging a complaint. For the reasons set out above, therefore, the Board finds that the respondent company in this proceeding has status to raise the allegations of intimidation.

9. The respondent presented certain evidence relating to the conduct of the applicant's organizing campaign. Of particular concern to the Board is an incident which occurred while Ms. Pat Newton, an employee of the respondent, was circulating a petition in opposition to the instant application for certification.

10. Ms. Lise Provencal initiated the organizing campaign of the employees of the respondent in January, 1979. She asked her husband, Conrad Provencal, who is a steward for the Lumber and Sawmill Workers' Union if his union could organize them. To this end a meeting was held on January 22nd and attended by most of the employees in the bargaining unit. Although the union spokesman at the meeting advised the employees that their interests might best be served by another union, he undertook that the Lumber and Sawmill Workers' Union would protect their jobs until they established a relationship with another union. In the interim he instructed the employees to speak to Mr. Provencal if they had any problems.

11. A second meeting was arranged for January 29th where Mr. Joe O'Donnell, a business representative with the applicant union, met with the employees. It was at this meeting that most of the union cards were signed. There is no dispute between the parties that throughout the campaign Lise Provencal was the chief employee organizer and the intermediary between the union and the employees.

12. On February 10th Pat Newton began to circulate a petition in opposition to the instant application. She testified that by lunchtime on February 10th she had approached seven employees and obtained four signatures. She stated that she had intended to approach others that evening after work. The evidence establishes that on the same day Conrad Provencal's wife called him home from work because she had received a call from a fel-

low employee informing her that Newton was circulating a petition. Mr. Provencal stated that he dissuaded his wife from going to work to confront Newton because he was afraid she was too angry and would probably have hit her. He went instead. As soon as Provencal entered the store Ms. Helen Lafond, an employee in the bargaining unit, went over to him to tell him that Newton was circulating a petition.

13. Provencal confronted Newton at her place of work. The evidence accepted by the Board establishes that Provencal told Newton that if she continued to circulate the petition she would get into big trouble. He said that if she wanted trouble she would get it. Provencal admitted that he spoke to Newton in an angry tone of voice and that he intended to frighten her into ceasing her efforts in opposition to the trade union. He was evidently successful in doing so. The Board accepts Newton's testimony that after Provencal left she ripped up the petition because she was scared.

14. *Kendall Company (Canada) Limited*, [1975] OLRB Rep. Aug. 611 and *Du Pont of Canada Limited*, [1961] OLRB Rep. Jan. 361 are two cases where the Board has dealt with allegations of wrongful activity aimed at interrupting the circulation of a petition. In both cases the Board dismissed the complaints and certified the union on the grounds that the acts complained of were not of a such a nature as to prevent through intimidation the subsequent circulation of the petitions. In *Kendall Company (Canada) Limited* the circulator was at the company gates openly circulating another petition the day after his original petition was ripped up by an employee collector. The circulator was so far from being intimidated that on the following day he sought to provoke an incident in front of two employees with whom he was talking. In *Du Pont* the Board was satisfied that the employees ceased circulating their petitions because of the union organizer's suggestion that the petitions might ultimately jeopardize the jobs of some of their fellow employees and not because of any acts of intimidation directed against them. The Board emphasized that it was not intended to act as a censor of mere social pressures exerted either for or against a union.

15. Unlike the incidents in *Kendall* and *Du Pont*, the activities of Conrad Provencal, by his own admission, were designed to intimidate Newton and scare her into destroying the petition. Whether or not these tactics constitute a violation of section 61 of the Act is not determinative of the matter. Under The Labour Relations Act employees are given an opportunity to state their opposition to a union's application for certification by filing a petition with the Board. A petition which meets the requirements of timeliness and form set out in Rule 48, displays sufficient overlap with the membership evidence and is found to be a voluntary statement of desire may leave the Board in doubt as to the true intentions of the membership evidence submitted to the Board, the Board exercises its discretion under section 7(2) of the Act and orders a representation vote to ascertain the true wishes of the employees.

16. In this case, Provencal's effective scare tactics which interrupted the circulation of the petition clearly exceed the bounds of acceptable pressure. Although Provencal was not a member of the applicant union he was the husband of the key employee organizer. Moreover, he was himself recognized as an active and effective participant in the organizing campaign as evidenced by the fact that Lafond as well as his wife called upon him to deal with the Newton petition. In view of his role in the initiation of the organizing campaign, his position as a union steward and an outsider, his confrontation with Newton cannot be brushed aside as an isolated incident of a hothead. His actions deprived employees of an

opportunity to express their wishes to the Board through the Newton petition. Having regard to all the circumstances of this case and the means by which the petition was interrupted, the Board finds that it is left in doubt as to whether the membership evidence filed was, as of the terminal date, an accurate expression of the wishes of the employees. To resolve that doubt the Board hereby orders the taking of a representation vote among the employees of the respondent in the bargaining unit. All employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

17. Voters will be asked to indicate whether they wish to be represented by the applicant in their employment relations with the respondent.

18. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER, O. HODGES:

1. I concur in the decision to hold a vote in this matter. However, I wish to comment on the policy of the Board and the Regulations relative to this case. My comments follow with my reasons for joining with the majority in ordering a vote.

2. The evidence in this case highlights the atmosphere of tension and anxiety that so often accompanies the trade union organization process. While there was no evidence in this case to suggest management interference in the petition, it is common knowledge that anti-union petitions are often management inspired, and also that, when management does take active steps to counter union organization, the job security of union members may be threatened. These facts, while they do not justify all of the actions of Conrad Provencal in this case, may contribute to an understanding of the intensity of his response. Mr. Provencal is a trade union leader of strong conviction, and I do not fault him for responding to his wife's call for help. Enthusiasm for the right of workers to organize must be encouraged in our democracy. However, more light and less heat in presenting his argument to the petitioner would have been inoffensive.

3. Although the Board in other cases has not questioned the propriety of permitting an employer in the context of certification proceedings to raise allegations of intimidation and coercion against a union in the conduct of its organizing campaign, the practice gives me some concern. Section 61 of *The Labour Relations Act* protects employees from intimidation or coercion by a trade union and section 79 provides the procedure to deal with a breach of section 61. Employees who wish to raise charges in order to challenge the validity of evidence of membership in a trade union may also do so in the course of certification proceedings. Having regard to the fact that it is desirable to discourage, wherever possible, any shift by an employer away from a position of neutrality during a union's solicitation of membership, I would prefer to see any allegation of improper trade union behaviour come directly from an employee to the Board, rather than through the employer. The latent possibility of management interference in the right expressed by section 3 of the Act, would I suggest, be lessened if management's role as an advocate of employee rights was considered improper by the Board.

1573-78-R The Association of Allied Health Professionals: Ontario, (Applicant), v. **Scarborough Centenary Hospital Association**, (Respondent).

Certification – Practice and Procedure – Pre-Hearing Vote – Representation Vote – Personnel Director of employer present during the taking of the vote – whether secrecy of ballot affected or vote not likely to disclose true wishes of employees

BEFORE: Ian C. A. Springate, Vice-Chairman and Board Members W. H. Wightman and W. F. Rutherford.

APPEARANCES: *Catherine Bowman for the applicant; Murray Levis for the respondent.*

DECISION OF THE BOARD; April 9, 1979

1. This is an application for certification in which the Board by a decision dated January 18, 1979 directed the taking of a pre-hearing representation vote among certain of the respondent's para-medical employees.
2. The pre-hearing representation vote was conducted on February 6, 1979 and on that date the Board's returning officer issued his report with respect to the vote. The report of the returning officer indicates that during the vote 35 ballots were cast in opposition to the applicant while 31 ballots were cast in its favour. The applicant is now seeking to have the results of the pre-hearing representation vote set aside and a new vote taken.
3. One basis for the applicant's contention that the vote result should be set aside was a conversation between Mr. M. Levis, the respondent's personnel director, and a group of employees on the day of the vote. Three time periods were set aside for the taking of the vote, namely 8:00 to 8:15 a.m., 10:00 a.m. to noon and 3:45 to 4:15 p.m. The evidence establishes that shortly prior to 10:00 a.m. Mr. Levis stopped to talk to a group of social workers and occupational therapists who were having coffee in the cafeteria. Mr. Levis urged those in the group to vote and added that they should also encourage other employees to vote. Nothing was said by Mr. Levis as to whether those present should vote for or against the applicant. Further there is nothing to indicate that Mr. Levis spoke to any other employees concerning the vote.
4. In assessing the conduct of the parties during the taking of a representation vote the Board is concerned that such conduct not have destroyed the secrecy of the ballot or have created a situation where the vote was not likely to disclose the true wishes of the employees. In the instant case we are satisfied that Mr. Levis' comments to the group of employees would not likely have produced either of these results. Accordingly we do not regard his comments as a basis for setting aside the results of the pre-hearing representation vote.
5. In support of its position the applicant also relied on Mr. Levis' presence at the poll during periods when employees were entitled to vote. In this regard it should be noted that a pre-hearing vote meeting was held on January 3, 1979 to make arrangements for the taking of the vote. At that meeting Mrs. Catherine Bowman, the applicant's executive director, indicated that she would be serving as the applicant's scrutineer. Mr. Levis for his part indicated that a secretary by the name of Mrs. Ward would be acting as the respondent's scrutineer.

6. During the first voting period of 8:00 to 8:15 a.m. Mr. Levis acted as the respondent's scrutineer. Mr. Levis testified that he felt there would be no objection to him doing so in that the applicant's executive director was acting as the union scrutineer, and indeed no objections were raised at the time. Four employees voted during this period.

7. Mr. Levis was present at the poll when it was due to re-open at 10:00 o'clock although Mrs. Ward was not. At the time Mr. Levis indicated he would stay until Mrs. Ward arrived. Mrs. Bowman at first objected to Mr. Levis' presence but subsequently withdrew her objection so as to allow the poll to open on time. Shortly after the opening of the poll Mrs. Ward entered the polling area and Mr. Levis left. Mr. Levis indicated that he could not recall any employees having voted prior to Mrs. Ward's arrival, although Mrs. Bowman testified that she could recall that a number of employees had been waiting to vote when the poll opened.

8. Just prior to the closing of the poll at noon, Mr. Levis appeared and indicated that he would be acting as the respondent's scrutineer during the third voting period from 3:45 to 4:15 p.m. Mrs. Bowman, however, later indicated to the Board's returning officer that she did not feel that Mr. Levis should act as a scrutineer. When informed of this objection Mr. Levis decided not to attend at the poll in the afternoon and as a result the respondent did not have any scrutineer at the poll during the final voting period.

9. It is the applicant's contention that Mr. Levis' presence at the poll would likely have had an undue influence on employees when they arrived to vote, and that consequently the results of the pre-hearing representation vote do not reflect the true wishes of the employees. We are somewhat concerned that the applicant should now take this position in light of Mrs. Bowman's apparent initial willingness to accept Mr. Levis' presence at the poll and the fact that once a clear objection was raised to his acting as a scrutineer Mr. Levis refrained from doing so. Having regard to our conclusion with respect to the applicant's position, however, we see no need to deal with this issue.

10. The Registrar in giving his instructions regarding the taking of representation votes recommends that rank-and-file employees be employed in this task. The Board does not, however, insist upon this as a precondition to the taking of a valid vote. In that a scrutineer is the representative of a party at the vote, the choice of the scrutineer ought to be left to the discretion of that party. Having said this, however, the Board recognizes that the choice of a scrutineer may in certain situations improperly affect the ability of bargaining unit employees to freely indicate their true wishes in the representation vote, and that consequently the choice of a scrutineer may be a factor in having a representation vote set aside. See *J.R. Menard Ltd.*, [1972] OLRB Rep. Oct. 915.

11. In the instant case the respondent's personnel manager was present at the poll when at least four, and possibly more, of the employees who voted cast ballots. However, there were no other incidents prior to or during the conduct of the vote which might give special significance to this fact. Further, the applicant itself did not utilize a rank-and-file employee as a scrutineer. During all of the voting periods Mrs. Bowman, the applicant's executive director, acted as its scrutineer. Taking these factors into account we do not believe that Mr. Levis' presence in the voting area for part of the time that the vote was being conducted would have likely unduly influenced employees such that they could not express their true wishes in the vote. Consequently we do not regard this as sufficient grounds for setting aside the results of the pre-hearing representation vote.

12. In that less than fifty per cent of the ballots cast in the pre-hearing representation vote were marked in favour of the applicant, this application is hereby dismissed.
 13. The Board will not entertain an application for certification by the applicant with respect to any of the employees of the respondent in the voting constituency within the period of six months from the date hereof.
 14. The Registrar will destroy the ballots cast in the pre-hearing representation vote taken in this matter following the expiration of thirty days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such thirty-day period.
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2086-78-R Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1403, 1747, 1963, 2480, 2482, 3227 and 3233, (Applicant), v. **Steinberg Inc.**, (Respondent).

Bargaining Unit – Construction Industry – Practice and Procedure – Board Geographic Area changed to conform with amendment to municipal and regional boundaries

BEFORE: Ian C. A. Springate, Vice-Chairman, and Board Members H. J. F. Ade and C. Ballentine.

DECISION OF THE BOARD; April 27, 1979

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4. The Board further finds that the applicant is a council of trade unions within the meaning of section 1(1)(g) of The Labour Relations Act.
5. The Board is satisfied that the constituent trade unions of the applicant have vested appropriate authority in the applicant to enable it to discharge the responsibilities of a bargaining agent within the meaning of section 9(1) of The Labour Relations Act.
6. The Board further finds that this is an application for certification within the meaning of section 108 of The Labour Relations Act.
7. The only job site currently affected by this application is located in the City of Orillia. The respondent has requested that the bargaining unit be described solely in terms of this particular job site. Section 108(1) of The Labour Relations Act, however, expressly provides that in the construction industry the Board must define the appropriate bargaining unit by reference to a geographic area and may not confine it to a particular project. In these circumstances the Board is satisfied that the bargaining unit should be described in terms of its standard geographic area #18, which is the area which includes the City of Orillia.
8. The Board's current practice is to describe area #18 in terms of the County of

Simcoe, the District Municipality of Muskoka and the Townships of Rama, Mara and Thorah in the County of Ontario. This description, however, is outdated and in need of change. The effect of *The Regional Municipality of Durham Act, 1973* was to dissolve the County of Ontario, and to divide the area included within the former county between the newly created Regional Municipality of Durham and an enlarged County of Simcoe. Of the three geographic townships in the former County of Ontario which have been included in the Board's geographic area #18, two, namely Mara and Rama, were annexed to the County of Simcoe. The third, Thorah, became, along with certain lands further south, part of the township municipality of the Township of Brock, which is one of the eight area municipalities comprising the Regional Municipality of Durham.

9. As a general rule, we feel that when redescribing the limits of a Board area to reflect changes in municipal, regional and county boundaries, the Board should seek to ensure that the actual territory comprising the Board area is altered as little as is reasonably possible. In this case, however, we are of the view that a relatively minor change to the Board area is in order so as to have the relevant portion of the area #18 boundary follow the dividing line between the enlarged County of Simcoe and the Regional Municipality of Durham. Such a change will not only ensure that interested parties in the future will be able to quickly and accurately ascertain the boundary, but it will also avoid having the township municipality of the Township of Brock divided between two separate Board areas.

10. Having regard to the above, we are satisfied that the Board's geographic area #18 should from now on be described in terms of the County of Simcoe and the District Municipality of Muskoka.

11. The Board hereby finds that all carpenters and carpenters' apprentices in the employ of the respondent in the County of Simcoe and the District Municipality of Muskoka, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

12. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of one or other of the constituent trade unions of the applicant and therefore, pursuant to section 9(3) of The Labour Relations Act, are deemed to be members of the applicant on April 26, 1979, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

13. A certificate will issue to the applicant.

1909-78-R United Counties of Stormont, Dundas and Glengarry,
(Applicant), v. Canadian Union of Public Employees, (Respondent).

Termination – Whether to exercise discretion under section 51 where failure to bargain caused by matters not within control of Union

BEFORE: Rory F. Egan, Alternate Chairman, and Board Members W. H. Wightman and W. F. Rutherford.

APPEARANCES: *Raymond J. Lapointe and Douglas R. McConnell for the applicant; Helen Browne, Andre Drouin and Steve Backs for the respondent.*

DECISION OF THE BOARD; April 5, 1979

1. This is an application under section 51(2) of The Labour Relations Act for a declaration that the respondent no longer represents the employees in the bargaining unit for which it is the bargaining agent.
2. Section 51(2) reads as follows:

“Where a trade union that has given notice under section 13 or section 45 or that has received notice under section 45 fails to commence to bargain within sixty days from the giving of the notice or, after having commenced to bargain but before the Minister has appointed a conciliation officer or mediator, allows a period of sixty days to elapse during which it has not sought to bargain, the Board may, upon the application of the employer or of any of the employees in the bargaining unit and with or without a representation vote, declare that the trade union no longer represents the employees in the bargaining unit.”
3. The application is dated February 19, 1979 and alleges that the union has not sought to bargain with the applicant for the renewal of an expired collective agreement since December 12, 1978. The bargaining unit in the matter were employees of the Home for the Aged in Cornwall.
4. The evidence is that notice of desire to bargain and proposals were given by the union on October 19, 1978 and the applicant submitted counterproposals on November 1st. Meetings were held on December 11th and December 12th. There was a settlement reached with respect to non-monetary matters and the applicant tabled a monetary offer to be considered by the Local.
5. At the date of this hearing, the Local had not responded to the December 12th proposal. The applicant made several attempts to contact the representative of the Local by phone calls on January 24th and January 31st.
6. The employer submitted that the union ought, but was not making a sincere and genuine effort, to make a collective agreement and to partake in ongoing discussions with that in view. It submitted that the application was justified because the union was simply sitting on the proposals without stating why they were not acceptable if such was the case. The

result was that the applicant said that although the applicant was making a sincere effort to reach agreement, the union was stalling.

7. The union did not dispute the history of events as explained by the company. The union agreed that there had been a telephone call received from the applicant on January 31st to which its representative forgot to reply.

8. The union's explanation for its failure to get on with the matter was basically that there was a change in representatives at the time. Mr. Drouin, who was the negotiator, told the Board that he had advised the applicant at the end of the meeting held on December 12, 1978, that a new representative would be appointed but that the date was uncertain and he would be in touch in early January.

9. The new representative, Steve Backs, was appointed on January 2, 1979. On January 9th, Drouin attended a general membership meeting where he explained that the new representative had arrived but that he would require some training and that he and Drouin would be very busy because they were engaged in an application for certification for another group. There is no evidence of lack of acceptance of this explanation by the employees.

10. On January 25th, Drouin and Backs met with Mr. Lapointe, Administrator and Clerk-Treasurer of the applicant. Mr. Backs was introduced as the new representative. This meeting had to do with negotiations for another group of employees of the municipality. Nothing was said directly about the negotiations for the Home for the Aged. Mr. Drouin said that he did explain that they were very busy with the new organizational drive and the orientation of the new representative. He apparently thought that this would serve to advise the applicant of the reasons for the delay in dealing with the monetary offer. Mr. Drouin had no further reasons for the delay other than the one already alluded to, that is, that he simply forgot to return the employer's call of January 31st.

11. It has been said many times by the Board that the purpose of section 51 is to protect employees and, in a proper case, the employer against a union which stakes out a claim to represent certain employees and then takes no steps within a reasonable time to forward the interests of those employees. In the present case the default relied upon in the application is allowance by the union of a lapse of a period of more than sixty days in which it did not seek to bargain.

12. The section, the Board has held, is to be used as a shield and not as a sword and is to be used so that the Board may call upon the union to give an explanation for its failure to continue negotiations.

13. In the present case there was no delay in the giving of notice to bargain and the union attended two bargaining sessions with the applicant, at which progress was made toward the conclusion of an agreement. The union had at least demonstrated its concern for the good of its members to that extent.

14. The break in the negotiations with the tabling on the monetary proposals is not too unusual or unreasonable in order that consideration be given by the union to this serious aspect of the negotiations. It was equally to be expected, of course, that the union would respond to the proposals within a reasonable time.

15. There is no doubt that the change in officers, the intervention of the holiday period and the organizational drive were all factors in causing delay and were, to a degree, matters not entirely within the control of the Local. The employer had been advised that the change in representatives was in the wind and might cause delay, and it did. We are asked to infer that the failure to return the employer's call was due to these same pressures and, while we have some difficulty with this, we are prepared to accept that explanation.

16. The issuance of a declaration terminating the bargaining rights of a trade union under section 51 is a serious matter. The making of such a declaration is left to the discretion of the Board to be exercised as it deems the circumstances require. In the present situation, while we appreciate the difficult situation the employer found itself in seeking to conclude an agreement in the face of the union's lack of response, we are of the opinion that while the conduct of the union cannot be condoned, it nevertheless does not warrant, in all of the circumstances herein, the termination of its bargaining rights.

17. The application is accordingly dismissed.

2111-78-M Universal Handling Equipment Company Limited, (Employer), v. United Steelworkers of America, (Trade Union).

Collective Agreement – Conciliation – Reference – Whether a collective agreement is void *ab initio* if union is mistaken as to the level of benefits which had been agreed to by both the company and the union

BEFORE: R. O. MacDowell, Vice-Chairman and Board Members F. W. Murray and W. F. Rutherford.

APPEARANCES: *D. W. Brady, C. Dyson and M. Gerrard for the employer; Victor Solomatenko and Ben DesRoches for the trade union.*

DECISION OF THE BOARD; April 30, 1979

1. This is a reference, pursuant to section 96 of The Labour Relations Act. The Minister seeks the opinion of the Board on the question of his authority to appoint a Conciliation Officer.

2. The Board notes that the correct name of the employer is "Universal Handling Equipment Company Limited."

3. Between November 10, 1976 and November 9, 1978, the parties were bound by a collective agreement comprising some forty typed pages and including provisions concerning wages, holidays, vacation pay, hours of work, shift premiums, safety and health, grievance procedures, and other terms and conditions of employment. In September 1978 the trade union notified the employer that it wished to negotiate certain amendments to this agreement, that would be embodied in a new agreement to commence on the expiry of the

old one. The parties met in September and October and reached an apparent settlement of all outstanding matters. This settlement included significant wage increases, as well as improvements in certain other benefits, and was embodied in a "Memorandum of Agreement" dated November 2, 1978 which was executed by the parties and, subsequently, ratified by both the employer and the trade union membership. That Memorandum contains the following language:

23.06 The company will increase the dental plan coverage to equal Blue Cross Rider #2, effective November 10, 1978.

4. Article 23.06 establishes a supplementary dental benefit in addition to that which existed in the previous agreement. It is a "new block" which has been added to an established benefit package which remains, in all other respects, unchanged. The interpretation of Article 23.06 is at the heart of the present dispute.

5. The employer takes the position that it undertook to provide an insurance scheme which would reimburse employees for *50% of the fees charged* for the services covered by the supplementary benefit plan. This, the employer says, is the effect of "Blue Cross Rider #2" and this is the additional benefit which it agreed to provide. The employer argues that any disagreement as to the interpretation of Article 23.06 should now be resolved through grievance/arbitration provisions of the agreement.

6. The trade union contends that when it agreed to the language of Article 23.06 it was under the impression that the entire cost of the additional services would be covered, and that it was on this understanding that it agreed to Article 23.06 in its present form. The trade union further contends that because the agreed language may result in a benefit less generous than that which it thought it was negotiating, the entire 3-year agreement is void *ab initio*. The union argues that the parties were not "ad idem" on the effect of this particular clause and that the agreement is, therefore, a nullity. If there were no agreement, it would follow that the parties would be free to proceed to conciliation and engage in a strike, or lock-out, in the event they are unable to reach a new agreement.

7. For the purpose of this decision the Board is prepared to assume (without finding) that the employer's interpretation of Article 23.06 is correct, and proceed to determine what effect, if any, might flow from any misapprehension on the part of the union.

8. The union called Mr. Ben DesRoches, the principal union negotiator, to give evidence to establish the union's "mistake." Mr. DesRoches is a staff representative of the union and has been servicing Local 7204 for approximately eight years. He attended all of the negotiating meetings and, together with certain other members of the bargaining committee, signed the purported Memorandum of Agreement. He testified that the proposal to amend Article 23.06 of the old agreement, in order to provide for additional coverage, originated with the trade union and, after some discussion, resulted in the employer's agreement to provide additional coverage equivalent to that specified in "Blue Cross Rider #2." Mr. Desroches had previously obtained from Blue Cross a statement of the insured services covered by Rider #2. This statement sets out a list of "prosthetic services" to which the Rider applies, as well as (in bold type) a statement that "PAYMENT WILL BE MADE ON THE BASIS OF 50% OF THE ONTARIO DENTAL ASSOCIATION SCHEDULE OF FEES ...". Mr. DesRoches testified, however, that the matter of the proportion of fees covered was

never specifically raised during the bargaining. His evidence was that the parties were *ad idem* concerning the language creating the proposed supplementary benefit, but that in agreeing to the reference to Blue Cross Rider #2, the union negotiators were under a misapprehension concerning the extent of that benefit. Indeed, it would seem that the union was assuming that the benefit was precisely double that which was clearly indicated on the face of the documents which it had obtained from Blue Cross.

9. The Memorandum of Agreement dated 2nd November, 1978 was, in fact, the second Memorandum of Agreement which the parties had signed. An earlier Memorandum of Agreement (which contained the same language concerning the dental plan) had been rejected by the union membership at a membership meeting on October 8th, 1978. Prior to the ratification of the second Memorandum of Agreement, the parties had exchanged documents for proof reading and were satisfied that the language embodied in the Memorandum properly expressed their agreement.

10. On the basis of the evidence before us the Board is satisfied that the negotiations were concluded with the formal signing, and subsequent ratification, of the second Memorandum of Agreement. That Memorandum was not intended to be an interim agreement which would take effect while the parties continued to negotiate on outstanding issues. The second Memorandum of Agreement was clearly intended to be the final and binding settlement of all matters in dispute between the parties. Following the ratification of the Memorandum of Agreement, and the expiry of the old agreement, all of the wage increases and other benefits specified in the Memorandum of Agreement were implemented. At no time did the trade union take the position that these contractual provisions were unenforceable or were not legally binding – although Mr. DesRoches testified that he reached the conclusion in December, 1978, that there was no agreement between the parties.

11. Following ratification and implementation of the improved terms and conditions of employment, certain questions arose concerning the proper interpretation of the dental plan, the safety boot subsidy, and the “Heritage Day” holiday. These latter two matters were resolved, but at a meeting, on February 27th, 1978, the company repeated its position that the supplementary benefits plan which it had agreed to provide only covered 50% of the fees charged for the new services covered. Following this meeting, Mr. DesRoches was instructed by the local membership to seek conciliation.

12. A collective agreement is frequently the consummation of protracted, and arduous, bargaining, but the Act envisages that once the parties have reached agreement, and expressed that agreement in language deliberately chosen by them, they will remain bound for its prescribed term. Indeed, rescission of a collective agreement, before the expiry of its prescribed term, can only come about with the consent of both the parties, and the Ontario Labour Relations Board. The collective agreement is an essential element in an established legislative scheme to provide for stable employer/employee relations and industrial peace. The union’s contention in this case would seriously undermine these important legislative objectives for, whenever it appeared that a collective agreement might be less advantageous than was at first supposed, a trade union or employer could claim that it had misunderstood the bargain, or was motivated by considerations which afterwards turned out to be misconceived. If this could be successfully argued, there would be few unimpeachable agreements in the Province of Ontario. Virtually every dispute as to the interpretation of an agreement could become a “mistake” which would vitiate the entire agreement.

13. The supplementary dental benefit is a relatively minor part of this collective agreement, yet the union now contends that because it is less generous than anticipated the entire agreement must fall – or, more accurately, never existed. The Board simply cannot accept this contention. The Agreement accurately reflects precisely what the union bargained for, in precisely the terms which the union and the company accepted. Since the union had initiated the proposal for the new benefit and had in its possession a description of the coverage provided by Blue Cross Rider #2, it is difficult to understand how there could be any misunderstanding as to what it was bargaining for; but in any event, the Board is satisfied that there is a binding collective agreement between the parties and that any issue which remains is one of interpretation which must be resolved pursuant to the arbitration provisions in the agreement.

14. In the result, the Board is of the opinion that the Minister does not have the authority to appoint a Conciliation Officer because, in our view, the parties are currently bound by a collective agreement.

1924-78-R Bayview Villa Nurses' Association, (Applicant), v. **Villacentres Management Ltd.**, (Respondent), v. Canadian Union of Public Employees & its Local 1394, (Intervener).

Appropriateness – Bargaining Unit – Factors considered by Board – Whether to carve a craft unit out of an all employee unit

BEFORE: Kevin M. Burkett, Vice-Chairman, and Board Members C. G. Bourne and D. B. Archer.

APPEARANCES: *Michael G. Horan and Wilhel Lyew for the applicant; B. M. Paulin, Q.C. for the respondent; Jack White for the intervener.*

DECISION OF THE BOARD; April 3rd, 1979

1. The name: "The Villacentres Limited" appearing in the style of cause of this application as the name of the respondent is amended to read: "Villacentres Management Ltd."

2. This is an application for certification by an organization which has not previously established its status as a trade union within the meaning of the Act. The applicant seeks bargaining rights for a unit of all registered and graduate nurses employed in a nursing capacity save and except a number of exclusions not here relevant.

3. The employees for whom the applicant organization seeks bargaining rights are already represented by the intervener trade union as part of an all-employee bargaining unit. The intervener union was certified for an all-employee bargaining unit in 1973 and has entered into a number of collective agreements since that time which have covered all 68 full-time employees of the respondent including the 15 registered and graduate nurses. The

practice of the Board under section 6(1) of the Act, which reflects the Board's concern with undue fragmentation and its desire to maintain labour relations stability, is to conduct a vote in every case where an incumbent union holds bargaining rights and to require the applicant union to accept the unit represented by the incumbent as a voting constituency for purposes of the representation vote. The Board will not certify a successor union unless more than fifty per cent of those in the already established bargaining unit seek to be represented by the successor. Having regard to the existence of a viable bargaining structure the Board will never allow an applicant to carve out a portion of an existing bargaining unit under section 6(1) of the Act. In this case the applicant organization does not seek to represent the large number of employees in the all-employee unit who are not registered and graduate nurses and indeed its constitution does not allow these persons into membership. If the applicant is to succeed in carving out the unit which it seeks to represent it will have to do so under the provisions of section 6(2) of the Act.

4. Section 6(2) of the Act provides for the certification of employees who exercise technical skills or who are members of a craft by reason of which they are distinguishable from the other employees and commonly bargain separately through a trade union that according to established trade union practice pertains to such skills or craft. In applying Section 6(2) in respect of an attempt to carry out part of an existing bargaining unit, the Board must address itself to two questions. Initially the Board must satisfy itself that the unit applied for is an appropriate unit as defined by the section. If satisfied the Board must then determine whether the application merits the exercise of the discretion delegated to it by the section. The two issues are distinct. Considerations relevant to a determination of whether the unit applied for is appropriate differ from considerations relevant to the exercise of the delegated discretion.

5. Even if the Board was to find in this case that the unit sought is an appropriate one under section 6(2) of the Act it would not be prepared to exercise its discretion to apply the section where the group employees sought to be represented are included in a bargaining unit represented by another bargaining agent at the time the application is made. In exercising its discretion in other than construction industry applications under the section the Board had tended to focus on the nature and history of the representation given to the "craft" group by an incumbent union. Among the factors considered in this regard are:

- a) whether there has been a history of proper representation of the group in the existing unit,
- b) the existence of consecutive collective agreements,
- c) the existence in agreements of special provisions (normally wage provisions) covering the group,
- d) access of the group representation either in the processing of grievances or in negotiations,
- e) the attitude of the employer and incumbent union to the attempted carve out.

(For a listing of above factors see, *The University of Guelph*, [1975] OLRB Rep. 327 and

those cases set out in that decision from wherein the list is derived, e.g., *National Cash Register of Canada Ltd.*, [1969] OLRB Rep. 505; *Canadian Pacific Hotels Ltd.*, [1968] OLRB Rep. 282; *Pre-Con Murray Ltd.* [1969] OLRB Rep. 1003; *Atlas Steels Co. Ltd.*, [1965] OLRB Rep. 367; *Thompson Products Ltd.*, [1963] OLRB Rep. 463.) In *The University of Guelph* case (supra), which involved an analogous situation to the one presently before the Board, the Board refused to carve out a unit of firefighters from an all-employee unit. In determining whether to exercise its discretion, the Board noted that representation of the composite unit had existed for some seven years and that the wage schedule in the collective agreement then in force contained special provisions for the firefighters. As well, the Board found that although firefighters did not have their own shop steward, there was nothing in the incumbent union's constitution or by-laws preventing such from having occurred in the past or occurring in the future. The fact that the incumbent union's constitution did not contain provisions granting preferential access to the group to the representation structure of the incumbent did not preclude the Board from finding that access to such structure was sufficient. In other words, the Board was more interested in the existence of negative impediments to the representation of the group's special interests than in the existence of positive entitlements conferring preferential status on the group. The Board stated that in determining whether to exercise its discretion under section 6(2), it is concerned primarily with "the equality of representation as between groups within the particular bargaining unit" and not with "the quality of representation – judged against external comparisons". It went on to say "In the instant case, there is no evidence to persuade us that the firemen have been any less effectively represented than any other groups within the unit."

6. In this case there is no evidence before the Board as would cause it to exercise its discretion under section 6(2) of the Act. The incumbent union has represented the registered and graduate nurses for whom the applicant seeks representation rights as part of the all-employee unit for some six years and the collective agreement now in force provides for specific provisions covering nurses' wages and they are covered by the other terms and conditions of employment set out in that agreement. There is no evidence before the Board upon which to conclude that the incumbent union has failed to adequately represent the nurses within the all-employee unit. In the result, the Board declines to apply section 6(2) of the Act in the circumstances of this case.

7. The Board need go no further. This application is hereby dismissed.

1396-78-R Teamsters Union, Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, (Applicant), v. **Western Dispatch Inc.** operating as Western Dispatch Company, (Respondent).

Certification – Employee – Truck drivers purchasing equipment under a hire/purchase agreement and agreeing to perform transport work exclusively for the vendor/contractor found to be dependent contractors.

BEFORE: R. O. MacDowell, Vice-Chairman and Board Members F. W. Murray and O. Hodges

APPEARANCES: *Ken Petryshen for the applicant; L. A. Bertuzzi, M. Addario and R. De Ré for the respondent.*

DECISION OF THE BOARD; April 17, 1979

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.
3. The respondent employer filed a reply which included the names of some 23 individuals, however, the respondent contended that all of those individuals were “independent contractors” and not “employees” within the meaning of The Labour Relations Act. The applicant submitted that they were “dependent contractors” as defined in section 1(ga) of the Act. On December 4th, 1978 the Board appointed a Labour Relations Officer to report to the Board concerning:
 - “a) the nature of the relationship between the respondent and the persons who are affected by this application, and
 - b) the nature of the work performed by the persons who are affected by this application.”
4. The parties were agreed that the evidence of one person would be representative and the Officer was able to complete his inquiry on February 22, 1979. Following receipt of the Officer’s report the parties indicated that they wished to make representations on the contents of the report. A hearing for that purpose was convened on April 3, 1979. The only outstanding issue is whether the subject persons are “dependent” or “independent” contractors.
5. The term “dependent” contractor is defined by section 1(ga) of the Act as follows:

“dependent contractor” means a person, whether or not employed under a contract of employment, and whether or not furnishing his own tools, vehicles, equipment, machinery, material, or any other thing, who performs work or services for another person for compensation or re-

ward on such terms and conditions that he is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor.

The new provision ensures that a group of persons in an economic position closely analogous to that of employees will be entitled to participate in collective bargaining if the majority of them wish to do so. The meaning and effect of this 1976 amendment have been considered in a number of recent cases. See for example:

- Nelson Crushed Stone, [1977] OLRB Rep. Feb. 104
- Abdo Contracting, [1977] OLRB Rep. Apr. 197
- Indusmin Ltd., [1977] OLRB Rep. Setp. 552
- Canada Crushed Stone, [1977] OLRB Rep. Dec. 806
- Superior Sand, Gravel & Supplies, [1978] OLRB Rep. Feb. 119
- Dufferin Aggregates, [1978] OLRB Rep. Mar. 278
- Consolidated Sand & Gravel, [1978] OLRB Rep. Mar. 264
- Sherman Sand & Gravel, [1978] OLRB Rep. May 459
- Flintkote Co. of Canada Ltd., [1978] OLRB Rep. Sept. 822

It is unnecessary to review or restate the principles enunciated in those cases. There was no real disagreement between the parties as to the principles to be applied. The parties were in dispute, however, as to the application of those principles to the facts of this particular case.

6. The disputed persons are engaged by the respondent as “brokers” to deliver packages to destinations specified by the respondent. Before becoming “brokers” they were employed as drivers of the respondent’s vehicles, and became brokers by requesting a “broker’s run” when such runs became available. Upon becoming a broker, the driver entered into a standard form contract with the respondent. In fact, as the evidence indicates, this contract was not strictly adhered to, and did not exhaustively delineate the broker’s duties and responsibilities. There was no real negotiation between the broker and the respondent concerning the terms of the contract; moreover, the respondent has evidently unilaterally altered certain provisions of that agreement – including the method of payment – without negotiation with the brokers. The brokers were simply called to a meeting and informed that “that was the way it was going to be.” No new contract was signed; the brokers merely continued to work in accordance with the new terms. It should be noted that the original agreement referred to the brokers as “independent truckers”, but the respondent retained the “right to reduce the contractor’s (broker’s) work week” and, specifically, *prohibited the broker from transporting goods for anyone else*. Thus, the agreement itself seriously restricts the “independence” of the allegedly independent contractors.

7. Upon becoming brokers, the drivers enter into a form of financing arrangement

with the respondent which allows them to purchase the vehicles which they operate. This arrangement generally allows a broker to pay off the cost of his vehicle in two years. Until that time, title and registration of the vehicle remains in the name of the company. The selection of the vehicle and the financing arrangements are done by the company, and are also apparently presented to the broker on a "take it or leave it" basis. There is no negotiation on this aspect of the relationship, nor do the brokers arrange their own financing independently of the company. The finance payments are deducted from the payments made by the respondent to the broker for services rendered.

8. The broker's vehicles must be painted with the respondent company's colour scheme, and bear the company logo. The brokers are required to wear uniforms which, likewise, indicate the company affiliation. The respondent and the individual brokers share the cost of these uniforms. The company arranges insurance for the brokers' vehicles, in an amount which the company considers necessary, and deducts the insurance premium from its payments to them. Again, there is no negotiation on this matter. The company has also unilaterally decided to withhold some 5% of the broker's payment which is allocated to a "repair" fund. The evidence is not entirely clear on this matter, but it appears that the company regularly undertakes to repair the brokers' vehicles and this fund, or holdback, is intended to cover the cost of such repairs.

9. There is close supervision and control of the way in which the broker carries out his duties. All of the billings, invoices and other documentation are arranged or supplied by the company. The "company rules" – including the proper method of making deliveries, completing the paperwork, standards of dress and decorum, etc. – are posted on the bulletin board, and the brokers are expected to follow them. The brokers work a standard work week, are paid by cheque in accordance with the number of deliveries which they have made (at rates set by the company, less company-prescribed deductions) and there is a guaranteed minimum daily "wage." The brokers do not advertise, or seek out, their own customers; the respondent solicits the customers. *As has already been pointed out, the brokers are prohibited from serving any one other than the respondent, and since the P.C.V. and other licences are in the name of the respondent, the individual broker could not do so.* Until a few weeks prior to the application for certification, the brokers purchased gasoline on a credit card issued in the name of the respondent.

10. The respondent makes none of the usual employee deductions (for example, Workmen's Compensation) which one might expect it to make on behalf of employees. However, it appears that it does make at least some deductions from the brokers' payments which are referable to these purposes. The brokers feel that they must notify the company in the event they are sick, require time off or are involved in an accident; and that they must pre-arrange their vacations, and are entitled to only a specified vacation period (in the case of the single witness who gave evidence – two weeks.) While it is true that the more the broker works the more he will be paid, his only real input is his labour. The rates at which he works are pre-determined, and can be unilaterally altered by the company. In this respect, the broker's position is not substantially different from that of an employee on commission or one who performs "piece work." The sole mark of independence (in addition to the vehicle purchasing arrangement) is the broker's ability to "hire" a replacement driver for the limited periods of time when he is ill or on vacation. Even here, his independence is circumscribed because the agreement requires the respondent's consent prior to selecting a replacement. Moreover, it appears that the practice in respect of replacement drivers has var-

ied from time to time and for a considerable period time (up to about one month before the examination – but well after the application for certification) the company had advised the brokers that they could *not* hire replacements. In any event it appears that the hiring of replacements is infrequent and that when the brokers are on vacation, or otherwise unable to drive their vehicles, the company commonly provides drivers who perform the brokers' usual functions.

11. The Board must make its determination on the basis of the evidence before it, and can place little weight on the subjective impressions of the witness. Nevertheless, it is interesting to note that when asked directly whether he considered himself to be in business, the witness replied that he did not believe that he had a business. In the circumstances, this is not surprising for there is virtually no evidence of the kind of entrepreneurial activity which characterizes the small businessman/independent contractor.

12. Counsel for the applicant pointed out that there were certain aspects of the evidence which might support a finding that the brokers were "pure" employees – although neither party made this argument. The Board, however, is satisfied that the brokers are "dependent contractors" within the meaning of section 1(ga) of the Act and are, therefore, employees within the extended definition of that term.

13. In the circumstances, the Board finds that all dependent contractors of the respondent working at or out of Metropolitan Toronto, save and except dispatchers, those above the rank of dispatcher, sales staff and office staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

14. The Board is further satisfied, on the basis of all the evidence before it, that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on 27th March, 1979, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said.

15. A certificate will issue to the applicant.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING MARCH 1979

BARGAINING AGENTS CERTIFIED DURING MARCH

No Vote Conducted

0994-77-R: Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230 affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Indusmin Limited (Respondent).

Unit: "all dependent contractors working at or out of the respondent's facility at 150 McCowan Road, Scarborough in Metropolitan Toronto, save and except dispatchers and persons above the rank of dispatcher." (9 employees in the unit).

0475-78-R: United Steelworkers of America (Applicant) v. Radio Shack (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent who are regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except foremen and persons above the rank of foreman, office and sales staff." (employees in the unit).

1245-78-R: Wood, Wire and Metal Lathers International Union Local 562 (Applicant) v. Werner's Drywall of Waterloo Limited (Respondent).

Unit: "all lathers and lathers' apprentices in the employ of the respondent in the Regional Municipality of Waterloo except part of Beverly Township annexed by North Dumfries Township, save and except non-working foremen and persons above the rank of non-working foreman." (employees in the unit).

1741-78-R: International Union of Operating Engineers, Local 793 (Applicant) v. Howard Avery Contracting Limited (Respondent).

Unit: "all employees of the respondent working at or out of the respondent's Sinster Plant Road Yard at Wawa, Ontario, save and except non-working foremen, persons above the rank of non-working foremen, persons employed for not more than 24 hours per week and students employed during the school vacation period." (24 employees in the unit). (*Having regard to the agreement of the parties*).

1745-78-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Applicant) v. Coca-Cola Ltd. (Respondent) v. Employees (Objectors).

Unit: "all office employees of Coca-Cola Ltd. at Niagara Falls, Ontario, save and except office manager, persons above the rank of office manager, foremen and sales supervisors." (4 employees in the unit). (*Having regard to the agreement of the parties*).

1788-78-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (U.A.W.) (Applicant) v. NETP Limited (Respondent).

Unit: “all employees of the respondent in Niagara Falls, save and except foremen, persons above the rank of foreman, office and sales staff.” (34 employees in the unit). (*Having regard to the agreement of the parties*).

1846-78-R: Laundry and Linen Drivers and Industrial Workers Union, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Tempglass Limited (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (98 employees in the unit). (*Having regard to the representations of the parties*).

1852-78-R: Federation of Teachers in Hebrew Schools (Applicant) v. Beth Tzedec Congregation (Respondent).

Unit: “all teachers of the respondent save and except the principal and those above the rank of principal.” (26 employees in the unit).

1862-78-R: Federation of Teachers in Hebrew Schools (Applicant) v. United Congregational Schools (Respondent).

Unit: “all teachers of the respondent save and except the principals and those above the rank of principal.” (19 employees in the unit). (*Having regard to the agreement of the parties*).

1867-78-R: Local Union 2557, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Corporation of the Town of Wasaga Beach (Respondent) v. Group of Employees (Objectors).

Unit: “all outside employees of the Corporation of the Town of Wasaga Beach engaged in the construction and maintenance of roads and garbage collection save and except non-working foreman, persons above that rank, office, technical and clerical staff and persons regularly employed for less than twenty-four (24) hours per week and students employed during the school vacation period.” (22 employees in the unit). (*Having regard to the agreement of the parties*).

1868-78-R: Union of Canadian Retail Employees, Local 1000, Chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Applicant) v. Cordesco Limited (Respondent).

Unit: “all employees of the respondent in the Township of Vaughn, save and except foremen and persons above the rank of foreman.” (28 employees in the unit).

1870-78-R: Federation of Teachers in Hebrew Schools (Applicant) v. Bialik Hebrew Day School (Respondent).

Unit: “all teachers of the respondent in the field of Jewish education, save and except the principals and those above the rank of principal.” (21 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note – see Report of full decision [1979] OLRB Rep. March*).

1872-78-R: The International Brotherhood of Painters and Allied Trades, Local 1919 (Applicant) v. C. H. Heist (Canada) Ltd. (Respondent).

Unit: "all employees of the respondent in the City of Sault Ste. Marie, save and except foremen, persons above the rank of foreman, office staff, sales staff, persons employed in the construction industry and/or persons covered by subsisting collective agreements, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (13 employees in the unit). (*Having regard to the agreement of the parties*)

1876-78-R: Teamsters Local Union No. 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Cochrane-Dunlop Limited (Respondent).

Unit: "all employees of the respondent working at Sault Ste. Marie, save and except foremen, persons above the rank of foreman, sales staff, office staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (14 employees in the unit).

1883-78-R: International Union of Operating Engineers Local 793 (Applicant) v. Knight's Enterprises (Respondent).

Unit: "all employees of the respondent in the County of Lambton engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

1890-78-R: Service Employees Union, Local 204, A.F.L.-C.I.O., C.L.C. (Applicant) v. Medi Park Lodges Inc. carrying on business as Oakwood Park Lodge (Respondent).

Unit: "all employees of Oakwood Park Lodge in Niagara Falls, Ontario, regularly employed for not more than twenty-four (24) hours per week, save and except Registered Nurses, Physiotherapists, Supervisors, persons above the rank of supervisor and office staff." (28 employees in the unit). (*Having regard to the agreement of the parties*).

1898-78-R: Ontario Nurses' Association (Applicant) v. Regional Municipality of Sudbury Pioneer Manor – Home for the Aged (Respondent).

Unit #1: "all registered and graduate nurses employed in a nursing capacity by the respondent at its Pioneer Manor in the Regional Municipality of Sudbury, save and except Director of Nursing Services, persons above the rank of Director of Nursing Services and persons regularly employed for not more than twenty-four hours per week." (2 employees in the unit). (*Having regard to the representations of the parties*).

Unit #2: "all registered and graduate nurses employed in a nursing capacity by the respondent at its Pioneer Manor in the Regional Municipality of Sudbury who are regularly employed for not more than twenty-four hours per week, save and except Director of Nursing Services and persons above the rank of Director of Nursing Services." (8 employees in the unit).

1899-78-R: Ontario Nurses' Association (Applicant) v. Bestview Holdings Limited (Respondent) v. Christian Labour Association of Canada (Intervener).

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent at Bestview Lodge Nursing Home in the Town of Markham, save and except Director of Nurses and persons above the rank of Director of Nurses." (8 employees in the unit). (*Having regard to the representations of the parties*).

1900-78-R: Service Employees Union, Local 204, Affiliated with A.F. of L., C.I.O., C.L.C. (Applicant) v. Ballycliffe Lodge Limited, Ajax (Respondent).

Unit: "all employees of Ballycliffe Lodge Limited in Ajax, who are regularly employed for not more than twenty-four per week and students employed during the school vacation period, save and except professional medical staff, registered nurses, graduate nurses, physiotherapists, occupational therapists, supervisors, persons above the rank of supervisor, office staff and those persons covered under Board Certificate No. 1397-78-R." (35 employees in the unit). (*Having regard to the agreement of the parties*).

1901-78-R: United Cement, Lime and Gypsum Workers International Union (Applicant) v. Westroc Industries Limited (Respondent).

Unit: "all employees of the respondent at the Drumbo Mine, County Road 29, Drumbo, in the Township of Blenheim, in the County of Oxford, save and except foremen, persons above the rank of foreman, office and sales staff." (19 employees in the unit). (*Having regard to the agreement of the parties*).

1912-78-R: Federation of Teachers in Hebrew Schools (Applicant) v. Adath Israel Congregational School (Respondent).

Unit: "all teachers of the respondent in the field of Jewish education, save and except the principal and those above the rank of principal, the assistant Rabbi, tutors, and teachers aids." (17 employees in the unit). (*Having regard to the agreement of the parties*).

1916-78-R: Canadian Union of Operating Engineers and General Workers (Applicant) v. British Leaf Tobacco Company of Canada, Limited (Respondent).

Unit: "all seasonal employees of the respondent in Chatham, Ontario save and except foremen, persons above the rank of foreman, first-aid attendants, head cafeteria cook, chauffeur, office and sales staff, students employed during the school vacation period, persons normally employed for not more than 24 hours per week, and persons covered by the 2 subsisting collective agreements between the respondent and the Canadian Union of Operating Engineers and General Workers, Local 1000." (184 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note – see Report of full decision [1979] OLRB Rep. Mar.*).

1926-78-R: International Union of Electrical, Radio and Machine Workers, AFL CIO, CLC (Applicant) v. Atco Controls Limited (Respondent).

Unit: "all employees of the respondent at Smiths Falls, save and except office and sales staff, foremen and those above the rank of foreman." (43 employees in the unit). (*Having regard to the agreement of the parties*).

1927-78-R: International association of Bridge, Structural & Ornamental Ironworkers, Local 759 (Applicant) v. Aiton Power Limited (Respondent).

Unit: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the District of Thunder Bay, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

1928-78-R: Christian Labour Association of Canada (Applicant) v. Driving Pool Services Wm. Pou-lak Haulage and Leasing Ltd. (Respondents).

Unit #1: "all employees (including owner-operators) of respondent #1 operating out of its terminals at Port Colborne and Ingersoll, save and except foremen, persons above the rank of foreman, office and sales." (18 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees (including owner-operators) of respondent #2 operating out of its terminal at Port Colborne, save and except foremen, persons above the rank of foreman, office and sales staff." (3 employees in the unit). (*Having regard to the further agreement of the parties*).

1936-78-R: Pharmacists and Professional Employees Association, Local 1976 Chartered by the Retail Clerks International Union, C.L.C.-A.F.L. (Applicant) v. North Park Nursing Home Ltd. (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except registered nurses, supervisors, persons above the rank of supervisor, chef, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (36 employees in the unit). (*Having regard to the agreement of the parties*).

1937-78-R: Fuel, Bus, Limousine, Petroleum Drivers and Allied Employees, Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Plant National Parts Ltd. (Respondent).

Unit: "all employees of the respondent working at Mississauga, save and except foremen, persons above the rank of foreman, office and sales staff." (3 employees in the unit).

1938-78-R: Local Union 636 of the International Brotherhood of Electrical Workers AFL-CIO-CLC (Applicant) v. The Public Utilities Commission of the City of Belleville (Respondent) v. Employee (Objector).

Unit #1: "all office, clerical and technical employees of the respondent in the City of Belleville, save and except supervisors, persons above the rank of supervisor, secretary to the general manager, secretary to the office manager, secretary to the distribution engineer, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (15 employees in the unit).

Unit #2: "all employees of the respondent in the City of Belleville, save and except foremen, persons above the rank of foreman, office, clerical and technical employees, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (37 employees in the unit).

1949-78-R: Labourers' International Union of North America, Local 183 (Applicant) v. D & R Construction (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foreman and persons above the rank of non-working foreman." (4 employees in the unit).

1951-78-R: Service Employees International Union, Local 532 A.F. of L., C.I.O., C.L.C. (Applicant) v. Beacon Hill Lodges of Canada Ltd. (Respondent).

Unit #1: "all clerical employees of the respondent at Hamilton, save and except Supervisor, Foreman, persons above the rank of supervisor and foreman, the Confidential Secretary to the Adminis-

trator and persons regularly employed for not more than twenty-four hours per week." (employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: "all clerical employees of the respondent at Hamilton, regularly employed for not more than twenty-four hours per week, save and except Supervisor, Foreman, persons above the rank of supervisor and foreman, and the Confidential Secretary to the Administrator." (employees in the unit). (*Having regard to the agreement of the parties*).

1952-78-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.) (Applicant) v. Decedar Brothers Limited (Respondent).

Unit: "all employees of the respondent at Wallaceburg, Ontario, save and except foremen, foreladies, persons above the rank of foreman and forelady, office and sales staff, management trainees, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (48 employees in the unit).

1958-78-R: Labourers' International Union of North America, Local 837 (Applicant) v. Robertson-Yates Corporation Limited (Respondent) v. Operative Plasterers' and Cement Masons' International Association, Local 598 (Intervener #1) v. International Association of Bridge, Structural and Ornamental Ironworkers Local 736, Ironworkers District Council and The International Association of Bridge, Structural and Ornamental Ironworkers (Intervener #2).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman." (10 employees in the unit).

1967-78-R: Canadian Union of Public Employees (Applicant) v. Corporation of the Town of Cochrane (Respondent).

Unit: "all office employees of the Corporation of the Town of Cochrane, at Cochrane, Ontario, save and except clerk-treasurer and persons above the rank of clerk-treasurer." (5 employees in the unit).

1971-78-R: Canadian Union of Public Employees (Applicant) v. Quinte Sports Centre Committee of Management (Respondent).

Unit: "all employees of the respondent in Belleville save and except office staff, non-working foremen, persons above the rank of non-working foreman, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (9 employees in the unit). (*Having regard to the agreement of the parties*).

1973-78-R: Labourers' International Union of North America, Local 183 (Applicant) v. Laurier Homes Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario employed on residential construction, save and except construction labourers employed as helpers of bricklayers and plasterers, non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

1978-78-R: Teamsters Union Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. C. W. Henderson Cartage Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of C. W. Henderson Cartage Limited working at and out of Metropolitan Toronto save and except foremen and dispatchers, persons above the rank of foreman and dispatcher, office and sales staff, mechanics, security guards, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (37 employees in the unit). (*Having regard to the agreement of the parties*).

1984-78-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1963, 1304, 2480, 2482, 1747, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Candesco Interiors (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Simcoe, the District Municipality of Muskoka and the Township of Thorah and all land north thereof in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

1986-78-R: Canadian Union of Public Employees (Applicant) v. Huron Lodge a Division of The Algoma District Social and Family Services Board (Respondent).

Unit #1: "all employees of the respondent at the Town of Elliot Lake in the District of Algoma save and except the manager, persons above the rank of manager, secretary to the manager, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period." (10 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent at the Town of Elliot Lake in the District of Algoma regularly employed for not more than 24 hours per week." (5 employees in the unit). (*Having regard to the further agreement of the parties*).

1988-78-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. Redirack Industries Ltd. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the District of Thunder Bay, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

1989-78-R: The Canadian Union of Public Employees (Applicant) v. Marycrest Home for the Aged (Respondent).

Unit: "all lay employees of the respondent in Peterborough, Ontario, save and except supervisors, persons above the rank of supervisor, professional medical staff, graduate and undergraduate nurses, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (37 employees in the unit). (*Having regard to the agreement of the parties*).

1990-78-R: Service Employees International Union, Local 183 A.F. of L., C.I.O., C.L.C. (Applicant) v. The Corporation of the County of Lennox and Addington (Respondent).

Unit: "all Roads Department employees of the County of Lennox and Addington, save and except foremen, those above the rank of foreman, office and clerical staff, County Library staff, County Museum staff, dog catchers, custodian staff, County Social Services staff, County Planning Department staff, County Administration staff, Lenadco Home for the Aged staff, students employed for not more than twenty-four hours per week." (19 employees in the unit). (*Having regard to the agreement of the parties*).

1991-78-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Hanover and District Hospital (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Hanover, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, technical personnel, supervisors, persons above the rank of supervisors, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (60 employees in the unit). (*Having regard to the agreement of the parties*).

1997-78-R: Federation of Teachers in Hebrew Schools (Applicant) v. United Synagogue Day School (Respondent).

Unit: "all teachers of the respondent in the field of Jewish Education, save and except principal, and those above the rank of principal." (25 employees in the unit). (*clarity note* – see Report of full decision [1979] OLRB Rep. March).

1998-78-R: Retail Clerks International Union, Local 1979 affiliated with Canadian Labour Congress and AFL-CIO (Applicant) v. Wilson Automotive (Belleville) Limited (Respondent).

Unit: "all employees of the respondent at Belleville, save and except foreman, head shipper, head counter clerk, executive office staff, outside sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (37 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note* – see Report of full decision [1979] OLRB Rep. March).

1999-78-R: International Union of Operating Engineers, Local 793 (Applicant) v. Subterranean Foundation & Piling of Canada (Respondent).

Unit: "all employees of the respondent in the District of Thunder Bay engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

2003-78-R: Canadian Transportation Workers Union No. 188 National Council of Canadian Labour (Applicant) v. Superior Sanitation Services Division of Interflow Systems Limited (Respondent).

Unit: "all employees of the maintenance department, working in or out of the respondent's terminal in the Town of Ingersoll, in the County of Oxford, save and except foremen, persons above the rank of foremen, office staff, persons regularly employed for not more than (24) twenty-four hours per week." (2 employees in the unit).

2009-78-R: Labourers' International Union of North America, Local 183 (Applicant) v. Greenleaf Homes (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario employed on residential construction, save and except construction labourers employed as helpers of bricklayers and plasterers, non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

2014-78-R: United Brotherhood of Carpenters and Joiners of America Local Union 93 (Applicant) v. Kearney and Coles Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (10 employees in the unit).

2020-78-R: Service Employees Union, Local 268 (Applicant) v. The Lady Dunn General Hospital (Respondent).

Unit: "all employees of The Lady Dunn General Hospital, Wawa, Ontario, regularly employed for not more than twenty-four hours per week, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, graduate dietitians, student dietitians, technical personnel, supervisors, foremen, persons above the rank of supervisor or foreman, office staff, and students employed during the school vacation periods from May to September and persons covered by subsisting collective agreements." (28 employees in the unit). (*Having regard to the agreement of the parties*).

2021-78-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. Saveway Building Supplies Limited (Respondent).

Unit: "all employees of the respondent at its store in Sault Ste Marie, save and except yard foremen, persons above the rank of yard foreman, students employed during the school vacation period and persons regularly employed for not more than 24 hours per week." (8 employees in the unit). (*Having regard to the agreement of the parties*).

2022-78-R: Service Employees Union, Local 210, (affiliated with Service Employees International Union A.F.L. – C.O.O. – C.L.C.) (Applicant) v. Windsor Raceway Holdings Limited (Respondent).

Unit: "all employees in the maintenance department of the respondent at Windsor, Ontario save and except foremen, persons above the rank of foreman, students employed during the school vacation period and employees covered under subsisting collective agreements between the respondent and Windsor race Union Local 639 Service Employees Int'l. Union and Hotel & Restaurant Employees Union Local 743." (21 employees in the unit).

2026-78-R: The Ontario Acoustical and Drywall District Council, United Brotherhood of Carpenters and Joiners of America on Behalf of its affiliated Local Unions 785, 1316, 1617 and 2041 (Applicant) v. Field Interiors and Acoustics (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, engaged in the installation and erection of acoustical and drywall systems, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit). (*clarity note – see Report of full decision [1979] OLRB Rep. March*).

2030-78-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the Village of Bancroft (Respondent).

Unit: "all outside employees of the respondent in Bancroft, save and except office and clerical staff, foremen and persons above the rank of foreman." (5 employees in the unit).

2035-78-R: United Steelworkers of America (Applicant) v. Canadian Gypsum Company Ltd. (Respondent).

Unit: "all employees of the respondent at Hagersville, Ontario, save and except foremen, persons above the rank of foreman, office and clerical staff, technicians, and students employed during the school vacation period." (241 employees in the unit). (*Having regard to the agreement of the parties*).

2041-78-R: Amalgamated Clothing & Textile Workers Union (Applicant) v. Omega Neckwear & Apparel Ltd. (Respondent).

Unit: "all employees of the respondent in Midland, Ontario, save and except foremen, foreladies, persons above the rank of foremen and foreladies, office, clerical and sales staff, persons employed regularly for not more than twenty-four (24) hours per week and students employed for the summer vacation period." (27 employees in the unit). (*Having regard to the agreement of the parties*).

2044-78-R: United Steelworkers of America (Applicant) v. Lambton Recycling Industries Limited (Respondent).

Unit: "all employees of the respondent at Sarnia, save and except foremen, persons above the rank of foreman, office and sales staff." (16 employees in the unit).

2064-78-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1963, 1747, 2480, 2482, 3227 and 3233 (Applicant) v. A J Fish & Son Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

Applications Certified Subsequent to Pre-Hearing Vote

1742-78-R: Service Employees Union, Local 204 affiliated with A.F. of L., C.I.O., C.L.C. (Applicant) v. St. Raphael's Centres Limited carrying on business under the firm name and style of St. Raphael's Manor (Victoria Park) (Respondent).

Unit: "all employees of St. Raphael's Manor (Victoria Park) in Scarborough, save and except professional medical staff, registered nurses, graduate nurses and undergraduate nurses, physiotherapists, occupational therapists, Director of Activities, supervisors, persons above the rank of supervisors, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (23 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	14
Number of persons who cast ballots	14
Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	1

1799-78-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Applicant) v. Jordon & Ste-Michelle Cellars Ltd. (Respondent) v. International Chemical Workers Union and its Local 472 (Intervener).

Unit: "all employees of the respondent at its St. Catharines and Jordan Wineries, save and except assistant foremen, those above the rank of assistant foreman, office employees, part-time employees (i.e. averaging less than 24 hours per week) and persons temporarily employed during vintage." (68 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		68
Number of persons who cast ballots		63
Number of ballots marked in favour of applicant	61	
Number of ballots marked in favour of intervener	2	

1849-78-R: Canadian Union of Operating Engineers and General Workers (Applicant) v. Belleville General Hospital (Respondent) v. International Union of Operating Engineers Local 796 (Intervener).

Unit: "all stationary engineers employed in the power house of Belleville General Hospital at Belleville save and except the assistant director of engineering and maintenance and those above the rank of assistant director of engineering and maintenance." (5 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		5
Number of persons who cast ballots		5
Number of ballots marked in favour of applicant	3	
Number of ballots marked in favour of intervener	2	

Applications Certified Subsequent to Post-Hearing Vote

1248-78-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. The Sisters of St. Joseph of the Diocese of London in Ontario, as owner and operator of St. Mary's Hospital, London, Ontario (Respondent) v. Group of Employees (Objectors).

Unit: "all lay employees of St. Mary's Hospital, at London, Ontario regularly employed for not more than twenty-four hours per week save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, social workers, technical personnel (including in this exception, graduate and undergraduate: audiologists, physio-recreational, occupational, respiratory and speech therapists, laboratory technicians (supervisors, foremen, those above the rank of foreman, chief engineer, stationary engineers, and helpers, office and clerical staff (including in this exception ward clerks, admitting clerks, receptionists, information clerks, mail clerks, cashiers, librarians and switchboard operators) and students employed during the school vacation period." (79 employees in the unit).

Number of names of persons on revised voters' list		78
Number of persons who cast ballots		62
Number of ballots excluding segregated ballots cast by persons who names appear on voters' list	61	
Number of segregated ballots cast by persons whose name do not appear on voters' list	1	

1812-78-R: Service Employees Union, Local 478 (Applicant) v. Leisure World Nursing Homes Limited (Respondent).

Unit: "all employees of the respondent at North Bay, Ontario regularly employed for not more than

twenty-four hours per week and students employed during the school vacation period, save and except professional nursing staff, physiotherapists, occupational therapists, supervisors, foremen, persons above the rank of foreman or supervisor, office staff and persons covered by subsisting collective agreements." (18 employees in the unit).

Number of names of persons on list as originally prepared by employer		18
Number of persons who cast ballots	16	
Ballots segregated and not counted	1	
Number of ballots marked in favour of applicant	15	
Number of ballots marked against applicant	0	

APPLICATIONS FOR CERTIFICATION DISMISSED

No Vote Conducted

0974-78-R: Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Applicant) v. J. C. Milne Const. Co. (Canada) Inc. (Respondent) v. Labourers' International Union of North America, Local 506 (Intervener). (3 employees).

1430-78-R: Labourers' International Union of North America, Local 183 (Applicant) v. Finch – Jane High Rise Holding Ltd. and/or Escort Real Estate Ltd. (Respondent). (2 employees).

1780-78-R: The Hotel & Club Employees' Union Local 299, Toronto, Ontario of the Hotel and Restaurant Employees' and Bartenders' International Union, (A.F.L.-C.L.C.-C.I.C.) (Applicant) v. The Bristol Place Hotel (Respondent) v. Group of Employees (Objectors). (352 employees).

1889-78-R: Retail, Wholesale and Department Store Union, AFL/CIO/CLC (Applicant) v. Fine's Flowers Limited (Respondent). (13 employees).

1987-78-R: Oil, Chemical & Atomic Workers International Union (Applicant) v. Leco Industries Limited and Poly House Pkg. Limited (Respondents). (140 employees).

Certification Dismissed Subsequent to Pre-Hearing Vote

1707-78-R: Toronto Joint Board Amalgamated Clothing & Textile Workers Union (Applicant) v. Metro Sportswear Ltd. (Respondent).

Voting Constituency: "All employees of the respondent at its plant at 1315 Davenport Road, Toronto, Ontario, save and except foremen and foreladies, persons above the rank of foreman and forelady, designer, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (74 employees).

Number of names of persons on revised voters' list		73
Number of persons who cast ballots	69	
Ballots segregated and not counted	0	
Number of spoiled ballots	0	
Number of ballots marked in favour of applicant	20	
Number of ballots marked against applicant	49	

1771-78-R: International Association of Machinists & Aerospace Workers (Applicant) v. Mathews Conveyor Company a Division of Rexnord Canada Limited (Respondent).

Voting Constituency: "All office and technical employees of the respondent in the Town of Port Hope, save and except supervisors, persons above the rank of supervisor, sales personnel, Co-ordinators, persons employed in a confidential capacity in matters relating to labour relations and those persons covered by a subsisting agreement." (83 employees).

Number of names of persons on revised voters' list		77
Number of persons who cast ballots		76
Number of ballots marked in favour of applicant	26	
Number of ballots marked against applicant	50	

Certification Dismissed Subsequent to Post-Hearing Vote

1249-78-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. The Sisters of St. Joseph of the Diocese of London in Ontario, as owner and operator of St. Mary's Hospital, London, Ontario (Respondent) v. Group of Employees (Objectors).

Unit: "all lay Employees of St. Mary's Hospital, at London, Ontario, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, social workers, technical personnel (including in this exception graduate and undergraduate: audiologists, physio-recreational, occupational, respiratory and speech therapists, laboratory technicians), supervisors, foremen, those above the rank of foreman, chief engineer, stationary engineers and helpers, office and clerical staff, (including in this exception ward clerks, admitting clerks, receptionists, information clerks, machine clerks, cashiers, librarians and switchboard operators), persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period." (128 employees in the unit).

Number of names of persons on revised voters' list		126
Number of persons who cast ballots		116
Number of ballots marked in favour of applicant	50	
Number of ballots marked against applicant	66	

1684-78-R: Sheet Metal Workers. International Association Local Union #285 (Applicant) v. Wodbine Tinsmiths Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all journeymen sheet metal workers and sheet metal apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquering and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen, persons above the rank of non-working foreman, office and sales staff and gas fitters." (8 employees in the unit).

Number of names of persons on list as originally prepared by employer		8
Number of persons who cast ballots		7
Number of ballots marked in favour of applicant	2	
Number of ballots marked against applicant	5	

1750-78-R: The Hotel and Club Employees' Union, Local 299, Toronto of the Hotel and Restaurant Employees' and Bartenders' International Union, (A.F.L. -C.L.C. -C.L.C.) (Applicant) v. Richmond Street Health Emporium Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Toronto, Ontario save and except supervisors, persons above the rank of supervisor, office and sales staff and audit department." (12 employees in the unit).

Number of names of persons on revised voters' list		13
Number of persons who cast ballots		12
Ballots segregated and not counted	1	
Number of ballots marked in favour of applicant	2	
Number of ballots marked against applicant	9	

1863-78-R: United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO-CLC (Applicant) v. Barrday – Division of Wheelabrator Corporation of Canada Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at its operations at 75 Moorefield Street, Cambridge, save and except foremen, persons above the rank of foreman, office staff, sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (46 employees in the unit).

Number of names of persons on list as originally prepared by employer		48
Number of persons who cast ballots		43
Number of ballots marked in favour of applicant	13	
Number of ballots marked against applicant	30	

APPLICATIONS FOR CERTIFICATION WITHDRAWN

1709-78-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Unger Public Warehousing (Canada) Ltd. (Respondent). (9 employees).

1913-78-R: Retail Clerks International Association, CLC, AFL-CIO (Applicant) v. Hollandia Bakeries Limited (Respondent) v. United Bakery Workers Association Local No. 58, affiliated with the Christian Labour Association of Canada (Intervener). (40 employees).

1933-78-R: Labourers' International Union of North America, Local 1089 (Applicant) v. Omega Sewer & Water Main Contractors (Respondent). (5 employees).

1935-78-R: United Brotherhood of Carpenters and Joiners of America – Local Union 93 (Applicant) v. Kearney and Coles Limited (Respondent). (6 employees).

1961-78-R: Service Employees Union Local 268 (Applicant) v. Lady Dunn General Hospital (Respondent). (12 employees).

2005-78-R: Canadian Brotherhood of Railway Transport & General Workers (Applicant) v. Robert Hunt Corporation (Respondent). (7 employees).

2008-78-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1963, 1304, 2480, 2482, 1747, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Viceroy Homes (Respondent). (5 employees).

2070-78-R: Ontario English Catholic Secondary Teachers Association (Applicant) v. St. Joseph's High School (Respondent). (14 employees).

2088-78-R: United Brotherhood of Carpenters and Joiners of America (Applicant) v. Lewis – Cimco, Cimco Refrigeration, Cimco Limited (Respondent). (2 employees).

2150-78-R: Labourers' International Union of North America, Local 506 (Applicant) v. Tomar Plastering Limited (Respondent). (6 employees).

APPLICATION UNDER SECTION 1(4)

1432-78-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.) (Applicant) v. Young-Warren Food Brokerage Limited and 394579 Ontario Ltd. carrying on business under the style Big Bear Storage (Respondents) v. Group of Employees (Objectors). (2 employers). (*Withdrawn*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1500-78-R: Inga Toomes (Applicant) v. Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Respondent) v. Charles Wilson Limited (Intervener). (*Granted*).

Unit: "all office employees of Charles Wilson Limited at Metropolitan Toronto, save and except confidential secretary to the general manager, office manager, persons above the rank of office manager, office supervisor, foremen and sales supervisors, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period, chemists and quality control persons, and employees covered under an existing collective agreement with the Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers." (8 employees in the unit).

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	11
Number of ballots marked in favour of Respondent	2
Number of ballots marked against Respondent	9

1528-78-R: A group of Globe and Mail Employees (Applicant) v. Toronto Newspaper Guild, Local 87 of the Newspaper Guild (Respondent) v. The Globe and Mail Division of F. P. Publications (Eastern) Limited (Intervener). (*Granted*).

Unit: "All District sales representatives employed by The Globe and Mail Limited in its circulation department in the Province of Ontario, save and except branch managers and persons above the rank of branch manager, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period and employees presently covered by subsisting collective agreements." (65 employees in the unit).

Number of names of persons on revised voters' list		52
Number of persons who cast ballots	28	
Ballots segregated and not counted	1	
Number of spoiled ballots	1	
Number of ballots marked in favour of Respondent	1	
Number of ballots marked against Respondent	25	

1557-78-R: Carol Jean Thomas (Applicant) v. Ontario Nurses Association (Respondent) v. MacKenzie Nursing Home Limited (Intervener). (*Granted*).

Unit: "All registered and graduate nurses employed by the MacKenzie Nursing Home Limited (Downtown Convalescent Centre) in a nursing capacity save and except the Director of Nursing and persons above the rank of Director of Nursing." (16 employees in the unit).

Number of names of persons on list as originally prepared by employer		15
Number of persons who cast ballots	15	
Number of ballots marked in favour of Respondent	4	
Number of ballots marked against Respondent	11	

1560-78-R: Hamilton Forrest (Applicant) v. Canadian Union of Public Employees and its Local 1102 (Respondent) v. Public Utilities Commission of the City of Belleville (Intervener). (*Granted*).

Unit: "All employees of the intervener at Belleville, Ontario, save and except foremen, persons above the rank of foreman, office staff and students employed during the school vacation period, and, all office, clerical and technical employees of the intervener in the City of Belleville save and except supervisors, persons above the rank of supervisor, secretary to the General Manager, secretary or the Office Manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (51 employees in the unit).

Number of names of persons on list as originally prepared by employer		52
Number of persons who cast ballots	47	
Number of ballots marked in favour of Respondent	0	
Number of ballots marked against Respondent	47	

1600-78-R: Virginio Fadelli (Applicant) v. Canadian Paperworkers Union and its Local 1199 (Respondent) v. Independent Paper Convertors Inc. (Intervener). (17 employees). (*Dismissed*).

1699-78-R: Leonard S. Martin (Applicant) v. Labourers' International Union of North America, Local 183 (Respondent) v. The Cadillac Fairview Corporation Limited (Intervener). (*Terminated*).

Unit: "All employees of The Cadillac Fairview Corporation Limited employed to perform all work associated with building maintenance and janitorial cleaning including resident superintendents but save and except property managers, property management office and clerical staff or executive personnel in positions above property managers at and out of such buildings, complexes of buildings or central maintenance departments at 1441 Lawrence Avenue East, 7 and 9 Roanoke Avenue and 56 - 86 Cassandra Boulevard." (6 employees in the unit).

Number of names of persons on list as originally prepared by employer		6
Number of persons who cast ballots	6	
Number of ballots marked in favour of Respondent	0	
Number of ballots marked against Respondent	6	

1767-78-R: J. S. Mechanical (Applicant) v. Local Union 800 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Respondent). (3 employees). (*Withdrawn*).

1948-78-R: Cadillac Fairview Corporation Limited (Applicant) v. Canadian Union of Operating Engineers and General Workers (Respondent). (3 employees). (*Granted*).

APPLICATIONS FOR DECLARATION OF SUCCESSOR STATUS

1686-78-M: Stanley A. Brown (Applicant) v. Ontario Public Services Employees Union (Respondent Employees Organization) v. Centennial College of Applied Arts (Respondent Employer or Agency of the Employer). (*Granted*).

1865-78-R: Christian Labour Association of Canada (Applicant) v. Unger Nursing Homes Limited (Respondent). (*Granted*).

1968-78-R: Local 636, International Brotherhood of Electrical Workers A.F.L.-C.I.O.-C.L.C. (Applicant) v. The Public Utilities Commission of the Town of Kingsville (Respondent). (*Granted*).

1969-78-R: Local 636, International Brotherhood of Electrical Workers A.F.L.-C.I.O.-C.L.C. (Applicant) v. Essex Public Utilities Commission (Respondent). (*Granted*).

2010-78-R: Ontario Taxi Association Local 1688 (Applicant) v. Ontario Taxi Association (Respondent). (*Granted*).

APPLICATIONS FOR DECLARATION THAT STRIKE UNLAWFUL

2063-78-U: Johns-Manville Canada Inc. (Applicant) v. Canadian Chemical Workers' Union, Local 26, Charles Neilson, Wesley Chandler and the Persons named in Schedule "A" (Respondents). (*Withdrawn*).

2130-78-U: General Motors of Canada Limited (Applicant) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., and its Local 199; and Kenneth Amero, Paul Beauchamp and Joseph Belcastro, et al (see Schedules "A" and "B" attached) (Respondents). (*Withdrawn*).

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2090-78-U: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of United States and Canada, Local 105 (IATSE Local 105) (Applicant) v. R. Dalziel Enterprises Limited (Respondent). (*Withdrawn*).

2091-78-U: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of United States and Canada Local 105 (IATSE Local 105) (Applicant) v. R. Dalziel Enterprises Limited (Respondent). (*Withdrawn*).

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1345-78-U: The Ottawa Newspaper Guild, Local 205 of the Newspaper Guild (Complainant) v. The Citizen (A Division of Southam Press Limited) (Respondent). (*Dismissed*).

1604-78-U: Labourers' International Union of North America, Local 183 (Complainant) v. Pachino Construction Co. Ltd. (Respondent). (*Withdrawn*).

1793-78-U: United Steelworkers of America (Complainant) v. TCE Canada, A. Division of Tandy Electronics Limited) (Respondent). (*Dismissed*).

1794-78-U: United Steelworkers of America (Complainant) v. Radio Shack, a division of Tandy Electronics (Respondent). (*Dismissed*).

1795-78-U: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Complainant) v. The Sisters of St. Joseph of the Diocese of London in Ontario, as owner and operator of St. Mary's Hospital, London, Ontario (Respondent). (*Granted*).

1853-78-U: United Brotherhood of Carpenters and Joiners of America, Local 38 (Complainant) v. Robertson-Yates Corp. Ltd. (Respondent). (*Withdrawn*).

1866-78-U: Peter George (Complainant) v. Babcock & Wilcox Canada Ltd. and United Steelworkers of America Local 2859 (Respondents). (*Dismissed*).

1887-78-U: Canadian Union of Public Employees (Complainant) v. The Belleville Public Library Board (Respondent). (*Withdrawn*).

1888-78-U: Patricia E. Mannings (Complainant) v. York University Staff Association (Trade Union) and York University (Employer). (Respondents). (*Withdrawn*).

1903-78-U: Hotel & Restaurant Employees & Bartenders Union, Local 604, A.F.L., C.I.O., C.L.L. (Complainant) v. Rock Haven Motor Hotel (Respondent). (*Withdrawn*).

1917-78-U: Retail, Wholesale and Department Store Union, AFL: CIO: CLC (Complainant) v. Fine's Flowers Limited (Respondent). (*Withdrawn*).

1934-78-U: Hotel & Restaurant Employees & Bartenders Union, Local 604, A.F.L., C.I.O., C.L.C. (Complainant) v. Rock Haven Motor Hotel (Respondent). (*Withdrawn*).

1940-78-U: Teamsters Local 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helper of America (Complainant) v. Greb Industries Limited (Respondent). (*Withdrawn*).

1953-78-U: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.) (Complainant) v. Decedar Brothers Limited (Respondent). (*Withdrawn*).

1959-78-U: Ontario Nurses' Association (Complainant) v. Kent-Chatham Health Unit (Respondent). (*Withdrawn*).

1960-78-U: London Ambulance Attendants' Association Local 3, for Tecumseh and Leamington District (Complainant) v. Sunparlor Ambulance Services Incorporated (Respondent). (*Withdrawn*).

1962-78-U: John Komunicki (Complainant) v. Stedman's Employee's Association (Union) and Stedmans – Division of MacLeod Stedman Limited (Employer) (Respondents). (*Withdrawn*).

1963-78-U: Canadian Union of Operating Engineers and General Workers (Complainant) v. West-cane Sugar Limited (Respondent). (*Withdrawn*).

1965-78-U: Hotel & Restaurant Employees & Bartenders Union, Local 604 A.F.L., C.I.O., C.L.C. (Complainant) v. Rock Haven Motor Hotel (Respondent). (*Withdrawn*).

1966-78-U: Hotel & Restaurant Employees & Bartenders Union, Local 604 A.F.L., C.I.O., C.L.C. (Complainant) v. Rock Haven Motor Hotel (Respondent). (*Withdrawn*).

2011-78-U: United Electrical, Radio and Machine Workers of America (UE) (Complainant) v. Poly-bottle (Respondent). (*Withdrawn*).

2012-78-U: Karen Downs (Complainant) v. Elvio Dalorto (Business Agent A.C.T.W.U. Local 1764) (Respondent). (*Withdrawn*).

2013-78-U: Local Union 1590 of the International Brotherhood of Electrical Workers (Complainant) v. Bayly Engineering Limited (Respondent). (*Withdrawn*).

2024-78-U: Bruce Farinha (Complainant) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and its Local 124 and Titan Proform Company Limited (Respondents). (*Withdrawn*).

2032-78-U: International Ladies' Garment Workers' Union (Complainant) v. B. Marco Garment Company (Respondent). (*Withdrawn*).

2036-78-U: Bruce F. Near (Complainant) v. Canadian Union of Public Employees, Toronto, Local 79 (*Withdrawn*).

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1827-77-R: Labourers' International Union of North America, Local 506 (Applicant) v. Ellwall and Sons Construction Limited, A. & M. Ellis Limited (Respondents).

- and -

1828-77-R: The Toronto Building and Construction Trades Council; International Union of Bricklayers and Allied Craftsmen, Local 2; The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen on its own behalf and on behalf of International Union of Bricklayers and Allied Craftsmen, Local 2 (Applicants) v. Ellwall and Sons Construction Limited, A. & M.

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1431-78-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.) (Applicant) v. Coopers & Lybrand Limited Young-Warren Food Brokerage Limited 394579 Ontario Ltd. carrying on business under the style Big Bear Storage (Respondents) v. Group of Employees (Objectors). (*Granted*).

1646-78-R: Hotels, Clubs, Restaurants, Tavern Employees' Union, Local 261 (Applicant) v. Modern Building Cleaning Division (Respondent). (*Withdrawn*).

1768-78-R: International Union of Bricklayers and Allied Craftsmen and The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicants) v. Zoltan Fuisz, carrying on business under the firm name and style of Zoltan Fuisz Masonry Contractor, Zoltan Fuisz Interprovincial Masonry Limited, Interprovincial Masonry Co. Ltd. and Pembroke Masonry Limited (Respondents). (*Granted*).

1891-78-R: Local Union 636 of the International Brotherhood of Electrical Workers AFL-CIO-CLC (Applicant) v. The Richmond Hill Hydro-Electric Commission (Respondent). (*Granted*).

1947-78-R: United Brotherhood of Carpenters and Joiners of America, Local 3054 (Applicant) v. Selinger Wood Ltd., The House of Billiards Limited, and Al Peter Selinger (Respondents). (*Granted*).

APPLICATION UNDER SECTION 76 (FINANCIAL STATEMENT REQUESTED BY TRADE UNION MEMBER)

1970-78-M: William Egan, 29 Almond Road, London, Ontario, N5Z 4C5 (Complainant) v. Murray G. Bulger and Associates Limited Box 52, Toronto Dominion Centre Toronto, Ontario M5K 1G2 (Respondent). (*Terminated*).

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0516-78-JD: Duron Ontario Limited (Complainant) v. Labourers' International Union of North America, Local 183 (Respondent). (*Withdrawn*).

1881-78-JD: Graphic Arts International Union, Local 35-P (Complainant) Toronto Star Newspapers Limited, Printing and Graphic Communications Union No. N-1 (Respondents). (*Dismissed*).

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0846-78-U: Ontario Public Service Employees Union (Applicant) v. Lambton College of Applied Arts and Technology (Respondent). (*Terminated*).

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0934-78-M: Transit Windsor (Applicant) v. Division 616, Amalgamated Transit Union (Respondent). (*Granted*).

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1944-78-M: A. Cope & Sons Limited (Employer) v. Teamsters Local Union No. 879 (Trade Union). (*Terminated*).

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1168-77-M: International Union of Operating Engineers and in particular Local 793 (Applicant) v. Pipe Line Contractors Association of Canada, and its affiliate Majestic Wiley Contractors Limited (Respondent).

- and -

1275-77-M: International Union of Operating Engineers, Local 793 (Applicant) v. Pipe Line Contractors Association of Canada, and its affiliated Majestic Wiley Contractors Ltd. (Respondent). (*Granted*).

1909-77-M: Toronto Building and Construction Trades Council, International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen on its own behalf and on behalf of International Union of Bricklayers and Allied Craftsmen, Local 2 (Applicants) v. The General Contractors Section of the Toronto Construction Association, Ellwall and Sons Construction Limited, A & M Ellis Limited and The Masonry Industry Employers Council of Ontario (Respondents).

- and -

1910-77-M: Labourers' International Union of North America, Local 506 (Applicant) v. The General Contractors Section of the Toronto Construction Association, Ellwall and Sons Construction Limited and A & M Ellis Limited (Respondents).

1265-78-M: Labourers' International Union of North America, Local 183 (Applicant) v. Tru-Wall Group Limited (Respondent). (*Granted*).

1755-78-M: Labourers' International Union of North America, Local 527 (Applicant) v. John Entwistle Construction Limited (Respondent) v. Employer Bargaining Agency (Intervener). (*Dismissed*).

1787-78-M: Sheet Metal Workers' International Association, Local Union No. 562 (Applicant) v. K & B Sheet Metal of Guelph Limited (Respondent). (*Terminated*).

1884-78-M: United Brotherhood of Carpenters and Joiners of America, Local 1617, and The Ontario Drywall and Acoustical District Council (Applicants) v. Roscetti Drywall Limited (Respondent). (*Withdrawn*).

1892-78-M: Labourers' International Union of North America, Local 183 (Applicant) v. Vanbots Construction Co. Ltd. (Respondent). (*Withdrawn*).

1919-78-M: Labourers' International Union of North America, Local 183 (Applicant) v. All-In-One General Contracting Co. Ltd. (Respondent). (*Withdrawn*).

1922-78-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Trades of the United States and Canada, Local 46 (Applicant) v. Highland Mechanical Inc., carrying on business as Hyland Mechanical Contractors (Respondent). (*Granted*).

1932-78-M: Operative Plasterers' and Cement Masons' International Association of the United States and Canada "Restoration Steeplejacks" Local #172 (Applicant) v. Swing Stage Limited (Respondent). (*Withdrawn*).

1983-78-M: Labourers. International Union of North America, Local 183 (Applicant) v. Metropolitan Toronto Apartment Builders Association and Westbury Developments (Respondents). (*Granted*).

2037-78-M: Local 47, Sheet Metal Workers' International Association (Applicant) v. Harlow Sheet Metal (Respondent) v. Ontario Sheet Metal and Air Handling Group (Intervener). (*Withdrawn*).

2098-78-M: Labourers' International Union of North America, Local 506 (Applicant) v. Ronway Construction Limited (Respondent). (*Withdrawn*).

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Related Employer – Sale of a Business – One corporate entity carrying on business through two divisions – whether section 1(4) applicable – non-union business sold to union business – whether section 55 applicable.

GENERAL BAKERIES LIMITED; RE RETAIL, WHOLESALE, BAKERY AND CONFECTIONERY WORKERS' UNION, LOCAL 461

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Religious Objectors – whether objection to payment of union dues based on sincerely held religious beliefs.

UNIVERSITY OF WINDSOR; RE JOHN W. SPELLMAN; THE UNIVERSITY OF WINDSOR FACULTY ASSOCIATION

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PACHINO CONSTRUCTION COMPANY LTD.; RE LABOURERS' UNION, LOCAL 183

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Sale of a Business – Related Employer – One corporate entity carrying on business through two divisions – whether section 1(4) applicable – non-union business sold to union business – whether section 55 applicable.

GENERAL BAKERIES LIMITED; RE RETAIL, WHOLESALE, BAKERY AND CONFECTIONERY WORKERS' UNION, LOCAL 461

400

Section 79 – Discharge for Union Activity – employer alleging discharge for cause – employer unaware of union activity – no evidence of anti-union animus – grievor not union organizer but only member – complaint dismissed.

ST. RAPHAEL'S NURSING HOMES LIMITED; RE S.E.I.U., LOCAL 204

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CITY OF TIMMINS; RE C.U.P.E., LOCAL 210

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Section 112a – Arbitration – Construction Industry – Employer arguing portion of grievance untimely – whether waiver by failing to object to timeliness of entire grievance.

KERBEL DEVELOPMENTS LIMITED; RE LABOURERS' UNION LOCAL 183

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Termination – Petition – Practice and Procedure – Applicant employee wishing to withdraw – other employees at hearing granted status to proceed with application – employer referring employees to lawyer – employer advising employees legal fees would be paid by company – application dismissed.

SELINGER WOOD LTD.; RE EMERY BAECHLER; CARPENTERS UNION, LOCAL 3054

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0888-75-M Ontario Public Service Employees' Union, (Applicant, v. **The Board of Governors of Algonquin College, et al**, (Respondents), v. Group of Employees, (Intervenors)

Bargaining Unit – Employee – Natural Justice – Board determining four persons within job classification employees under Colleges Collective Bargaining Act without prejudice to status of eighteen other persons in same classification – Union and Employer subsequently agreeing to include entire classification in bargaining unit – eighteen persons objecting to inclusion requesting re-hearing – whether objectors directly affected by first decision – whether failure to give notice to objectors denial of natural justice

BEFORE: Arthur Haladner, Vice-Chairman and Board Members D.B. Archer and E.C. Went.

APPEARANCES: *S.T. Goudge, Bob Hebdon and Garry Griffen for the applicant; F.G. Hamilton, Q.C. and Harley Smith for the respondents; F.R. von Veh, Harold Powell and Dorothea Moss for the interveners.*

DECISION OF THE BOARD; May 15, 1979

1. This matter arises out of a reference filed pursuant to section 82 of The Colleges Collective Bargaining Act, 1975, in which the employment status of twenty-two persons, classified by the respondent employers as "development officers" was raised in issue. In a decision dated May 9, 1977, [1977] May OLRB Rep. 257, the Board determined that the four development officers, examined by the Labour Relations Officer, were employees for purposes of the Act, and properly part of the "support staff" bargaining unit defined in Schedule 2 of the Act. In its decision, the Board made it clear that it was not determining the employment status of the eighteen development officers not examined. In Paragraph 2 it stated:

Pursuant to the difficulties encountered by the Labour Relations Officer in adopting procedures for examining each development officer the parties agreed to the submission of an interim report after the completion of four interviews. It was contemplated that the Board's determination with respect to these persons may very well resolve the employment status of the balance of the disputed officers. It is to be noted that the Board's rulings are without prejudice to a party's position with respect to its view of the status of those persons who were not examined.

2. Following the Board's decision, the Ontario Council of Regents and the Ontario Public Service Employees' Union (OPSEU) agreed, by collective agreement, to include the development officer classification in the support staff bargaining unit represented by OPSEU. The effect of that agreement was to include in the support staff bargaining unit the eighteen development officers not examined by the Board.

3. These eighteen development officers, although now seeking a hearing before the Board, are not requesting the Board to reconsider its decision of May 9th, 1977. Their coun-

sel made it clear that they are prepared to let the Board's decision in respect of the four development officers stand. Counsel is requesting that the Board reconvene its proceedings and permit the other eighteen development officers to make representations regarding their employment status. This request is based on counsel's contention that there has been in this case a denial of natural justice. Counsel asserts that the eighteen development officers were not given notice of the proceedings which resulted in the Board's determination of May 9th. It follows, counsel says, that natural justice has been denied. A number of authorities were cited in support of this contention. Counsel relies in particular on *Brampton Transport Limited*, [1969] OLRB Rep. Jan. 1085 and *Bradley et al vs. Corporation of the City of Ottawa et al*, 67 CLLC ¶14,043.

4. While the rules of natural justice contemplate that all persons whose rights are directly affected by the decision of a judicial or quasi-judicial agency have notice of the proceedings, and are provided with an opportunity to make representations, they do not stretch so far as to mandate notice to persons who, although they may be incidentally affected by the outcome of the proceedings – as a result of decisions subsequently made – either by the tribunal or the parties themselves – are not directly affected or involved. If it were otherwise, there would be no end to the persons upon whom notice would be required to be served. This is particularly so in the labour relations context where the impact of a Board decision may ripple far beyond the immediate parties to the dispute.

5. We do not consider the authorities relied upon by counsel as being particularly persuasive in this case. By contrast to the situation in *Brampton*, the persons in respect of whom the Board has made a decision here were all given notice and afforded an opportunity to make representations. As was recognized by counsel, the Board's decision dealt only with the employment status of the four development officers examined. It did not deal, nor did it purport in any way to deal, with the employment status of the remaining eighteen. That being the case, it cannot be said that the eighteen development officers were entitled, as of right, to notice of the Board's proceedings. Those proceedings were not proceedings in which their rights were directly affected, as was the situation in *Bradley* where the tribunal's ruling deprived, of its own force, the employees not given notice of benefits conferred by the employer. We would add that had the eighteen development officers participated in the proceedings, it is difficult to see how their participation could have affected the result. At the hearing, the respondent employers took the position that the four development officers, examined by the Labour Relations Officer, were not employees within the meaning of the Act, and this position was put forward by experienced labour relations counsel. In any event, as stated, the development officers are not seeking to have the Board's decision set aside.

6. Again, the Board's decision dealt with the employment status of the four development officers examined by the Board. After considering that decision, and its implications for the status of the other eighteen, the parties decided, on their own, to conclude an agreement incorporating the development officer classification. According to its chairman, N.E. Williams – in a letter dated July 26th, 1978, "The Council of Regents saw no evidence that the duties and responsibilities of the other development officers in question were in any way at variance with those examined by the Ontario Labour Relations Board and agreed to include the development officers in the support staff bargaining unit represented by OPSEU. Hence, the renewal agreement incorporates the development officer classification."

7. Counsel for the development officers asserts that this agreement was, in fact,

based on a misinterpretation of the Board's decision. However, he does not suggest that the Board has any power to vacate an agreement voluntarily arrived at, and he does not ask that we make such an order. Stripped to its essentials, counsel's objection to what has occurred appears to be that the Board's decision has been used by the parties as a precedent – to resolve the employment status of the remaining disputed officers.

8. The fact is that the parties have now concluded an agreement in respect of these officers and it must be presumed, at least for present purposes, that they have acted in good faith. It is well known that the issue of employment status is of fundamental concern to employers as well as trade unions. As the Ontario Public Service Labour Relations Tribunal put it in *Charles Leutz, et al*, May 15, 1978:

“Employers have generally demonstrated a substantial interest in ensuring that management personnel are not included in the bargaining unit ... Basically employers recognize that a person clothed with managerial duties and responsibilities faces a conflict of interest which is capable of rendering his or her managerial function less effective if such a person is also a member of the bargaining unit and subject to the pressures of being both a member of the bargaining unit and a member of the union.”

8. On the representations before us, there was nothing which would indicate the absence in the situation at hand of this fundamental interest. As already noted, the employers opposed the inclusion of the four development officers – on the ground that they were not employees. In any event, the Board has no power to police, through section 95, mutual agreements arrived at by the parties in respect of the bargaining unit. Such mutual agreements are within the prerogatives of the parties – as we held in a related context in *York University*, [1978] OLRB Rep. Aug. 790.

9. The Board finds, for the reasons stated, that there has not been in this case a denial of natural justice and that we should not re-open the proceedings for the purpose requested.

2023-78-U Canadian Union of Operating Engineers & General Workers, (Complainant), v. **A E S Data Limited**, (Respondent).

Changes in Working Conditions – Technological changes affecting job duties – whether reallocation of job duties violation of section 70 – Section 70 purpose reviewed

BEFORE: R.O. MacDowell, Vice-Chairman and Board Members F.W. Murray and O. Hodges

APPEARANCES: Larry Haiven for the applicant; L.A. Bertuzzi, Charles Gordon, Gary Ulias and Martin Addario for the respondent.

DECISION OF THE BOARD; May 8, 1979

1. This is a complaint alleging that the respondent has breached the "statutory freeze" provisions of section 70(1) of The Labour Relations Act – by improperly altering the terms and conditions of employment, rights or privileges, of the grievor, Mr. M. Chauhan. The parties are in agreement that the trade union has been certified, that proper notice to bargain has been given, and that the allegedly improper conduct is within the time frame to which section 70(1) applies. There is no allegation that the employer conduct with which we are concerned is in any way motivated by the grievor's union activities.

2. The respondent has been carrying on business at its present location since January 1978. Since that time there has been a rapid expansion in the scope of its operations, and a continuous re-organization of the methods of production, as the firm "gears up" to full capacity. The number of employees has increased from ten to approximately ninety, and is still increasing.

3. The grievor was hired as a truck driver in March, 1978. He remained in that position for about 3 months. In May of 1978 the grievor was transferred to the job of "stock-keeper" in the respondent's "stores." This job opening had not been posted, but the Board is satisfied that the employer does not have an established consistent practice of posting job openings. In any event, this case does not involve the creation of a new job, but rather a change of job functions.

4. The stock-keeping position has both a physical and clerical component. The stock-keeper is required to receive, shelve and distribute parts, as well as keep a record of these transactions. For a number of months the grievor was the only stock-keeper, and performed all of these functions by himself. During this time there was considerable expansion of the stores, as well as a number of changes in the way that the grievor carried out his duties. Indeed, the grievor indicated that he had introduced a number of time-saving modifications and improvements in the way in which the records were kept. The grievor worked overtime as and when required.

5. In September, 1978 the respondent assigned a second stock-keeper, Ernie Diaz, to the stores. The new stock-keeper and the grievor soon reached an informal arrangement as to the division of work. Diaz did most of the physical work, sorting and shelving the parts, while the grievor did most of the clerical work – recording the necessary information on the "Cardex" manual record keeping system, which management had introduced. The shifts of the two stock-keepers did not precisely overlap, so that each of the employees remained responsible for all of the job functions for the period (approximately one-and-a-half to two hours) when he was alone on the job; however, because of the arrangement that they had made, the grievor did almost all of the clerical part of the job, while Diaz did most of the physical work. This informal division of duties was maintained until January, 1979 when Diaz was transferred to the shipping department, and for a period thereafter, when a new stock-keeper was transferred into the stores. The employer did not object to this arrangement but there was no undertaking that it would be maintained in perpetuity, and the grievor admitted, in response to a question from the Board, that he understood that the situation could change in the event of a business re-organization, or the introduction of new equipment or methods.

6. With the exception of a brief period when the grievor was transferred to another job in the plant (he was dissatisfied after five days and returned to the stores) the grievor has

remained a "stock-keeper." There has been no basic change in his wages, hours of work, or other terms and conditions of employment. The functions associated with the stock-keeper position have remained basically the same, and still involve both physical and clerical work. The actual volume of work has increased considerably since May, 1978.

7. On February 26, 1978 the employer introduced a new system of record keeping known as a "103 word processing system." This system involved the use of an automatic typewriter and certain associated equipment. Although the apparatus is more complicated, and its operator requires some specialized training, the new system is simply a more efficient way of recording information. The other stock-keeper has been trained in the operation of the new system. He is now performing the record-keeping functions formerly performed by the grievor.

8. The grievor testified that there were never any complaints about the quality of his work, but on cross-examination he admitted that on several occasions his supervisor had expressed concern about inaccuracies in the records. The grievor maintained that these concerns were not a reflection on his own performance but rather on the "Cardex" method of record-keeping. Nevertheless, he testified that in January 1979 he began to keep a record of clerical errors "for his own protection" – a phrase that does indicate that he considered himself in some jeopardy. The grievor was advised that the respondent's dissatisfaction with his performance was one of the reasons why the other stock-keeper has been assigned to operate the new equipment. There is no evidence to suggest that in making its decisions the employer has been motivated by anything other than a bona fide concern for efficiency.

9. The thrust of the grievor's argument is that he should have been given this new "job"; or, to put it more precisely, that the clerical part of the stock-keeper's job should not have "been taken from him." The grievor contends that section 70 freezes not only the terms and conditions of employment associated with his position but also prevents the employer from altering the kind, or distribution, of work within that position. He asserts that an employee is entitled to continue to perform the tasks which he was performing at the onset of the freeze period – even where, as here, those tasks include only part of the job, and new equipment has been introduced. Accordingly, the grievor argues that he has a right to continue to perform the clerical aspects of the job and no obligation to do the physical work. Alternatively, he submits that when new equipment was introduced which modified the way in which the records were being kept, he, rather than the other stock-keeper, should have been sent on the training course to learn its operation. The grievor is suggesting, therefore, that the informal work arrangement which he and Diaz had established in the fall of 1978 has become a personal right, or privilege, which cannot now be altered.

10. The purpose of section 70 is to maintain the prior pattern of the employment relationship, in its entirety, while the parties are negotiating for a collective agreement. This ensures that they will have a fixed basis from which to begin negotiations, and prevents unilateral alterations in the status quo which might give one party an unfair advantage either from the point of view of bargaining or of propaganda. The status quo includes not only the existing terms and conditions of employment but also any other established benefits which the employees are accustomed to receive, and which can therefore be considered to be "privileges." It is clear that express promises, or a consistent pattern of employer conduct, can give rise to such privileges and that they are caught by the statutory freeze. It should be noted, however, that section 70 also freezes the "rights and privileges" of the employer. The

section requires *both* parties to maintain the existing pattern of their relationship; that is, to conduct their business as before. In *Spar Aerospace Products Limited*, [1978] OLRB Rep. Oct. 859, the Board discussed the effect of section 70 in the following way:

The "business as before" approach does not mean that an employer cannot continue to manage its operation. What it does mean is, simply, that an employer must continue to run the operation according to the pattern established before the circumstances giving rise to the freeze have occurred, providing a clearly identifiable point of departure for bargaining and eliminating the chilling effect that a withdrawal of expected benefits would have upon the representation of the employees by a trade union. The right to manage is maintained, qualified only by the condition that the operation be managed as before. Such a condition, in our view, cannot be regarded as unduly onerous in light of the fact that it is management which is in the best position to know whether it is in fact carrying out business as before. This is an approach, moreover, that cuts both ways, in some cases preserving an entrenched employer right and in other cases preserving an established employee benefit.

11. This approach of "business as before" has been recognized in a number of Board decisions, although for the most part these cases have involved an alteration of an employer policy, which affected a number of employees, while here the grievor is asserting that the "status quo" is his individual work situation. In *Canadian General Electric*, [1965] OLRB Rep. Dec. 649, for example, the Board found that an employer was entitled to lay off two employees during the currency of the section 70 freeze because it was an implicit term of their contract of employment that they could be laid off for lack of work. The present case involves the reverse situation. Here the changes of which the grievor complains result from expanding business activities, and consequent introduction of new methods and equipment.

12. In *Scarborough Centenary Hospital*, [1969] OLRB Rep. Jan. 1049, the Board dealt with a situation which is very similar to the present one. There it was alleged that a breach of the statutory freeze occurred when new duties were assigned to an employee. In rejecting this contention the Board found:

The assignment of new duties to Mr. Burrows cannot be construed as an alteration of a condition of employment as contemplated by the relevant sections. In our view, as a matter of discretion in the interest of sound labour relations, an employer must retain the right to assign individual employees on a day to day basis in order that the employer's business may be conducted in a viable way. While such transfers and assignments may be subject to restrictions as a result of collective bargaining, the employer's right to make such assignments and transfers remains intact subject only to the grievance procedure. Even if a collective agreement were to limit such activity by an employer an employer would be free to make the assignment or transfer within the framework of the limitation. If an employer deals with an individual employee in an unlawful manner relief may be available under section 50 or some other section of The Labour Relations Act. It is our view, however, that

section 59(1) of the Act and section 10 of The Hospital Labour Disputes Arbitration Act do not prohibit an employer from making the usual assignment of work in light of prevailing conditions on a day to day basis in the manner that was done by the respondent in this case.

The Board held that an employer was entitled to make ordinary business and production decisions which incidentally resulted in a modification of an individual employee's day-to-day work. Of course a proposed business re-organization might be of such kind, or degree, that section 70 would come into play; however, it is difficult to construe an individual employee's work situation as the kind of right, privilege, or benefit, contemplated by section 70 – especially when, as in this case, the informal division of responsibilities has been in effect for only a few months and the alteration does not result in any loss of wages to the complainant or anyone else.

13. There is ample evidence of the way in which various aspects of the grievor's employment relationship have changed in response to market pressures or the influence of the respondent's expanding business activities. From time to time the grievor has worked overtime. There have been changes in the method of record keeping. The number of stock-keepers has increased from one to two and, more recently, to three. The entire pattern has been one of change, and the Board is satisfied that the grievor could not reasonably have expected to continue to perform the same job functions, in exactly the same way. In particular, we do not consider that the work sharing arrangement which was in existence for several months was so entrenched, or of such character, that it could be considered a "privilege" to which the grievor has become entitled. On the contrary, it should have been apparent that the employer had retained the right to re-allocate the prescribed duties within the category "stock-keeper" where, in the employer's opinion, this was appropriate. In the present case, there has been no essential change in the functions of the stock-keepers, but simply a different division of their labour. The grievor is still a stock-keeper, and has suffered no financial loss from the re-assignment of duties. In the circumstances, the Board cannot find that the grievor had an established right or privilege to continue performing only a portion of the stock-keeper's job – particularly in the absence of any express, or implied, promise that this would be the case. In our view, the employer retained the right to assign, or re-assign, work on a day-to-day basis in order that its business could be conducted in the manner which it considered to be most efficient. We do not consider that, in the circumstances of this case, there has been a breach of section 70. In the result, the application is dismissed.

0633-78-M Canadian Union of Public Employees, Local 210, (Applicant),
v. The Corporation of the **City of Timmins**, (Respondent).

Employee – Section 95(2) – Whether foreman exercising managerial functions – factors reviewed

BEFORE: Arthur Haladner, Vice-Chairman and Board Members O. Hodges and F.W. Murray

DECISION OF THE BOARD; May 10, 1979

1. This is an application pursuant to section 95(2) of The Labour Relations Act. The union has requested the Board to determine whether or not

E. Major	-Water Foreman, Timmins
B. Adamson	-Water and Sewer Foreman, Tisdale
J. Boissonneault	-Sanitation Foreman
T. Deluca	-Sewer Foreman, Timmins
C. Pajala	-Roads Foreman, Tisdale
B. Moore	-Roads Foreman, Timmins
Fern Durepos	-Superintendent of Public Works

are employees within the meaning of The Labour Relations Act. The Board, in a decision dated July 28, 1978, appointed an Examiner to meet with the parties and enquire into the duties and responsibilities of the persons in question. The parties agreed that the evidence given by Mr. J. Boissonneault would be representative of himself as well as Messrs. E. Major, B. Adamson, T. Deluca, C. Pajala and B. Moore. The Board was subsequently informed that the applicant wished to withdraw its application in respect of Mr. Durepos.

2. The Board is now in receipt of the Examiner's report which consists of a transcript of an examination of Mr. Boissonneault and of Mr. Fern Durepos, Superintendent of Public Works. Because the parties did not request a hearing, the material on which the Board bases this decision consists of the written submissions of the parties and the report, as well as a number of exhibits.

3. The foremen in question report to the Superintendent of Public Works. The Superintendent described the hierarchy descending from the foremen as consisting of sub-foremen in some cases, leaders "A" in some cases, and then various classifications of employees, such as labourers, etc. Mr. Boissonneault has approximately twenty-one employees under his supervision. These employees are divided into 7 crews – six crews working on garbage trucks and one crew working on dumps. Boissonneault stated that he spends 85 to 90% of his time supervising employees, and the remaining 10 to 15% doing administrative work. He performs no work that is performed by employees in the bargaining unit.

4. Boissonneault prepares weekly work schedules for approval by a superior and is of the view that his scheduling recommendations are usually acted upon. His evidence is that decisions regarding work assignments are within his authority. For example, he assigns drivers to the individual garbage routes, and instructs the dump crew where to work and what to do. In addition, on occasions when he needs extra help, Boissonneault can approach other foremen directly to arrange a temporary borrowing of employees to perform

the necessary duties. He spends much of the day checking on his crews, inspecting the work of the employees and instructing them to correct work, if necessary.

5. The evidence is that Boissonneault has authority to issue verbal warnings and written reprimands and to send an employee home until further notice without consulting a superior.

6. Boissonneault appears to play no formal role in the selection of new employees. Promotions, transfers, etc. are required, under the collective agreement, to be governed by seniority provided that the employee with the longest service is qualified to do the job. Job posting provisions are contained in the collective agreements. The Superintendent expressed the view that the foremen are asked to evaluate the abilities of the men under them. In particular, he said, a foreman might be consulted regarding an employee who was working beneath him and applying for a transfer. Boissonneault stated that he checks on the performance of probationary employees and makes recommendations regarding whether they should be kept on. He stated that on each occasion the recommendation was accepted. Boissonneault also stated that he evaluates the performance of employees during the 60-day trial period after their selection for a position under his supervision and that it is his responsibility to decide if an employee is satisfactory or not. With respect to temporary hirings, Boissonneault annually estimates the number of employees required to accomplish spring clean-ups, and requests the hiring of persons needed above and beyond those borrowed from other departments. Other aspects of Boissonneault's role include: some authority to grant short periods of time off; some authority to commit the company to the purchase of materials; and some input into his budget. The evidence is that the foremen and the Superintendent hold weekly meetings at which matters such as personnel and disciplinary matters, recommendations regarding collective agreement provisions (on working conditions), interpretation of the collective agreement, City policies and work planning scheduling are discussed; that Boissonneault has his own office and is paid a salary (while the employees under his supervision are hourly rated) and that he, the Superintendent and the other foremen, but not the bargaining unit employees in his department possess keys to the shop, office and garage. In addition, Boissonneault may be asked to recommend the City's position on grievances at the first step. (The collective agreement provides for participation by the "immediate Foreman" and the Superintendent at the first stage.) He expressed the view that his recommendation to the Superintendent to deny a grievance is usually acted upon. Boissonneault stated that he has the authority to deal with some minor employee complaints before they become formal grievances. Boissonneault also maintains time records, checks and signs employee time cards, arranges overtime in an emergency, and appears to have some input into the adjustment of routes (which might affect the amount of overtime.) He investigates complaints from the public and arranges to have them solved.

7. Our conclusion, having regard to the above factors, is that the persons whose employment status is in dispute exercise managerial functions. They spend most of their time supervising the work of others, and make effective recommendations that materially affect the conditions of employment of those supervised. This renders their role inconsistent with participation in trade union activities. One purpose of section 1(3)(b) of The Labour Relations Act is to avoid a conflict of interest, and this purpose is served in this instance by finding that the persons in question exercise managerial functions.

1989-77-R 0247-78-U 0248-78-U 1484-78-U International Union of Bricklayers and Allied Craftsmen, Local 4, Ontario, (Complainant), v. **Dr. Hillers Peppermint Canada Limited and Karl Meyer**, (Respondents).

Certification – Construction Industry – Discharge for Union Activity – Employer laying-off union members and sub-contracting work – whether violation of section 56 – no employees remaining in bargaining unit as a result of employer conduct – unlawful conduct destroying normal certification process – whether section 7a applicable

BEFORE: Ian C.A. Springate, Vice-Chairman, and Board Members H.J.F. Ade and O. Hodges.

APPEARANCES: *S.B.D. Wahl and J. Mollica for the applicant/complainant; Nelson A. McKay for the respondents.*

DECISION OF THE BOARD:

1. The names “Bricklayers & Allied Craftsmen”; “Dr. Hillers Peppermint Canada Limited, Niagara Falls”; and “Carl Meyer” appearing in the style of cause of these applications and complaints are amended to read: “International Union of Bricklayers and Allied Craftsmen, Local 4, Ontario”, “Dr. Hillers Peppermint Canada Limited” and “Karl Meyer”, respectively.
2. Dr. Hillers Peppermint Canada Limited (“Dr. Hillers”) is a manufacturer of candy peppermint and similar products which operates a plant in Niagara Falls. These proceedings arise out of the construction of the plant and in no way concern the company’s current production employees. During the construction of the plant, Dr. Hillers acted as its own general contractor. Most of the actual construction work was contracted out to specialty contractors, although Dr. Hillers did employ a work crew of its own. File No. 1989-77-R is an application for certification filed by the International Union of Bricklayers and Allied Craftsmen, Local 4, Ontario, (“Local 4”) wherein it seeks to be certified as the bargaining agent for a unit of bricklayers and bricklayers’ apprentices in the employ of Dr. Hillers. It is the contention of Local 4 that in contemplation of this application Dr. Hillers contracted out its masonry work so that there would be no employees in the bargaining unit. It is Local 4’s further submission that as a result of the contracting out of the work two bricklayers were laid off by Dr. Hillers earlier than they otherwise would have been. Local 4 also contends that subsequent to the filing of the application for certification Dr. Hillers refused to hire a number of bricklayers because they were members of Local 4. On the basis of these alleged actions on the part of Dr. Hillers, Local 4 is now requesting that it be certified pursuant to the provisions of section 7a of The Labour Relations Act.
3. File No. 0248-78-U is a complaint under section 79 of the Act which seeks compensation for the two bricklayers who Local 4 claims were laid off as a result of Dr. Hillers contracting out its masonry work. File No. 1484-78-U is a complaint which claims compensation for those members of Local 4 which it is alleged Dr. Hillers improperly refused to hire. File No. 0247-78-U is an application in which Local 4 seeks consent to institute a prosecution of both Dr. Hillers and Mr. Karl Meyer, Dr. Hillers’ technical manager, for the alleged actions of Dr. Hillers already referred to above.

4. Work initially got underway at the Dr. Hillers site in June of 1977 with Mr. Meyer having overall responsibility for the construction of the plant. Mr. Meyer impressed us as an intelligent and astute businessman who was primarily concerned that the plant be built in an efficient yet economical manner.
5. Several attempts were made by officials of the local building trades council to convince Mr. Meyer to contract out work only to unionized contractors. Mr. Meyer, however, declined to do so and instead based his decisions as to what contractors should be awarded work on the basis of cost and efficiency. As it turned out, in dollar terms more work was contracted out to firms whose employees were unionized than to firms employing non-unionized crews.
6. From the very beginning of construction Dr. Hillers employed a crew of about eight men directly. Certain of these men were bricklayers by trade, but members of the crew were assigned to a wide variety of tasks including laying blocks, laying tiles and shovelling snow. The working foreman of the crew, Mr. A. Peters, is a bricklayer and a long-time member of Local 4, a fact known to Mr. Meyer. None of the other original members of the crew were members of Local 4.
7. In constructing its plant, Dr. Hillers made much use of concrete blocks, both for the exterior and interior walls. The laying of these blocks is work which is generally performed by persons employed as bricklayers. Although Dr. Hillers' own crew had been assigned to do some of the initial blocklaying work, it was Mr. Meyer's original intention to contract out the greater part of the work. To this end, bids were obtained from a number of masonry contractors. Initially bids were requested on the basis of the contractor supplying both materials and labour but later, when Mr. Meyer concluded that the bids were too high, additional bids were requested on a labour only basis. The lowest bidder was Cecchini Bros. Masonry Ltd. which put in a labour only bid of \$66,665.00. Cecchini Bros. is an established masonry contractor based in St. Catharines whose bricklayers are represented by Local 4.
8. Although Cecchini Bros. was the low bidder for the masonry contract it was not awarded the work. We are satisfied that this was in no way due to the fact that Local 4 held bargaining rights for Cecchini Bros.' employees. Rather, the reason was a feeling on the part of both Mr. Meyer and his superiors that all of the masonry bids were too high. Mr. Meyer testified that after a review of the bids he was instructed by his superiors to have Dr. Hillers' own forces do the work, although he should remain on the lookout for "a contractor" who could do the work at a lower rate.
9. Up to this time Dr. Hillers had been seeking bids for a single contract covering all of its masonry work, and all of the contractors who bid seem to have been fairly well established firms. There is nothing in the evidence to suggest that Mr. Meyer had given any thought to dividing up the masonry work into a number of contracts and awarding it to a variety of smaller firms, and indeed, even the instructions given to Meyer by his superiors do not seem to have addressed themselves to such a possibility.
10. Following Mr. Meyer's receipt of the instructions to have Dr. Hillers' own forces do the masonry work, some of the company's employees were assigned to perform block work which Mr. Meyer had originally intended to contract out. Towards the end of March 1978 the company hired two additional bricklayers to augment those of its employees doing

block work and instructed them to report for work on March 27, 1978. One of the bricklayers, Mr. L. Guillemette, was referred by the local Canada Manpower Centre. The other, Mr. H. Kloppenburg, had earlier left his name with Mr. Meyer as being in search of work. Mr. Kloppenburg at the time was a member of Local 4, a fact which Mr. Meyer commented on to Mr. Peters, the crew foreman. From Mr. Meyer's evidence there can be no doubt but that Mr. Meyer was aware that both Mr. Peters and Mr. Kloppenburg were members of Local 4 but that none of the company's other employees were union members.

11. As instructed, Mr. Kloppenburg and Mr. Guillemette reported for work on the morning of March 27, 1978. Later that morning Mr. Mollica, Local 4's business manager, went to talk to Mr. Meyer at his office next to the construction site. During the meeting Mr. Meyer asked Mr. Mollica if the union was in a position to supply him with additional bricklayers, in response to which Mr. Mollica replied that it would do so only if Dr. Hillers entered into an agreement with the union. Mr. Meyer indicated that he had no authority to enter into such an agreement. Mr. Mollica then requested and received permission to go onto the construction site to talk to Mr. Peters. After talking briefly to Mr. Peters, Mr. Mollica approached a number of other employees in an attempt to get them to sign into the union. Mr. Guillemette did in fact sign a union card. Mr. Mollica's actions were witnessed by Mr. Meyer through his office window, causing Mr. Meyer to go out to talk to him. The two men met as Mr. Mollica was leaving the job site and the two of them then entered into a brief conversation out of earshot of anyone else.

12. Mr. Mollica and Mr. Meyer gave somewhat conflicting versions of their discussion. Mr. Mollica testified that he was under the impression that a majority of Dr. Hillers' bricklayers were now union members, and as a result he indicated to Mr. Meyer that he would be filing an application for certification. Mr. Mollica further stated that at this point Mr. Meyer became very upset, threatened to discharge the people involved, and asked for the names of those bound to union membership, to which Mr. Mollica claims he mentioned Messrs. Peters, Guillemette and Kloppenburg. In his examination-in-chief Mr. Meyer testified that when the two men met Mollica said something like "I have the majority" but that no mention was made of any possible application for certification. Mr. Meyer also stated that he did not know what Mollica was talking about when he said he had the majority. In cross-examination, however, Mr. Meyer agreed that he understood that Mr. Mollica was talking about having a majority in the union. Mr. Meyer expanded upon this by stating that he did not believe Mr. Mollica's claim in that Dr. Hillers employed six bricklayers and only two of them, Mr. Peters and Mr. Kloppenburg, were union members. Mr. Meyer denied having threatened to discharge anyone, but instead stated that his only reaction was to order Mr. Mollica off the site in that he had been given permission to go on to the site only to talk to Mr. Peters.

13. Although the conversation between Mr. Mollica and Mr. Meyer was not overheard by anyone else, the evidence of Mr. Peters does throw some light on just what was said. As already indicated, Mr. Peters acted as the foreman of the Dr. Hillers crew. In addition to this he also assisted in co-ordinating the activities of the various contractors on the site. Although Mr. Peters has been a bricklayer and union member for some 25 years, after the completion of the Dr. Hillers plant he stayed on with the company as a night watchman at his old rate of pay. Parts of Mr. Peters' testimony ran counter to certain submissions put forth by counsel for Local 4, which doubtless explains why in his final submissions counsel suggested that Mr. Peters' testimony was suspect in that he had likely been offered the night

watchman's job in exchange for supporting the company against the union. In our view, however, Mr. Peters was a highly credible witness, and we are satisfied that he sought only to answer the questions put to him to the best of his ability. Mr. Peters was called as a witness by counsel for Dr. Hillers, who did not question him concerning the conversation between Mr. Meyer and Mr. Mollica. However, when the subject was raised in cross-examination Mr. Peters testified that after Mr. Mollica had left the job site on March 27th Mr. Meyer came over to him and said "he (i.e., Mollica) talked to me about certifying the job". When asked in re-examination if Mr. Meyer had stated that Mollica had spoken about certifying the job or of having a majority, Mr. Peters replied that he had spoken of certifying the job. When pressed further by counsel for Dr. Hillers, Mr. Peters stated that Mr. Meyer might have indicated that Mollica said he had a majority "but the subject was about certifying the job".

14. On the basis of Mr. Peters' testimony and Mr. Meyer's acknowledgement that he understood Mr. Mollica to be claiming that a majority of the bricklayers were now union members, we are satisfied that on March 27, 1978 Mr. Meyer was aware that Mr. Mollica felt that a majority of the bricklayers were now union members and also that Mr. Mollica was planning to file an application for certification.

15. Within days of Mr. Mollica appearing on the job site Dr. Hillers began to contract out the blocklaying work through a series of contracts let to a number of small masonry firms. This was a marked departure from the company's previous attempts to contract out all of the work to one subcontractor under a single contract. It was the contention of counsel for Local 4 that the subcontracting out of the work in this manner was motivated by a desire on the part of Dr. Hillers to avoid certification of Local 4 and to avoid having to deal with the Local as the bargaining agent for its employees. The position of counsel for Dr. Hillers, on the other hand, was that the timing of the contracting out of the work was purely coincidental.

16. Although not the first masonry contractor to actually appear on the site, the first masonry contract was let to "Joe Bayer Masonry". Mr. Meyer testified that on March 29, 1978 Mr. Joe Bayer came to the job site to inquire if there was any work. Mr. Meyer stated that he understood that Mr. Bayer played hockey with one of Dr. Hillers' employees and that he had asked this employee if Dr. Hillers could use a masonry contractor. An interesting point to all of this is that when being cross-examined Mr. Meyer stated that he had known Mr. Bayer for some years and that both of them were members of the same cultural club.

17. Mr. Meyer testified that when he met with Mr. Bayer on March 29, 1978, Mr. Bayer indicated that he would have to find a crew before he could undertake any work. Mr. Bayer returned to Dr. Hillers on the following day at which time he and Mr. Meyer signed a contract for Mr. Bayer to build, on a labour only basis, a firewall comprised of twelve inch block at a flat rate of \$1.00 per block. On April 27, 1978, after Bayer's first contract was completed, a second contract was entered into under which Bayer was to erect some internal partition walls at the rate of \$1.05 per block.

18. Mr. Bayer did not testify before the Board. However, we were given some insight into his operations as a masonry contractor. As already noted, when he first spoke to Mr. Meyer, Mr. Bayer indicated that he would have to find a crew before he could undertake

any work. In giving his testimony, Mr. Meyer stated that Mr. Bayer arranged for another firm, D. W. Lucato Construction Builders, to in fact do some of the work. The evidence of Mr. Peters on this point was even more enlightening. According to Mr. Peters, Mr. Bayer not only called in Lucato Construction to work on his contracts but also another firm called Niagara Masonry. While we were not given any figures as to how many men in all worked on the Bayer contracts, Mr. Peters stated that Mr. Bayer originally came on the site with five men. These facts lead us to wonder whether Mr. Bayer actually employed any bricklayers directly, or whether all of the men working on his contract, apart from himself, were employees of Lucato Construction and Niagara Masonry. What is perhaps most interesting about Bayer's involvement is that after Bayer finished his second contract in May or June of 1978, no further contracts were let to him, although subsequently a contract was let directly to Lucato Construction for it to lay blocks at 95 cents per block.

19. The first masonry contractor to have a crew working on the Hillers site was Armenti Brothers Masonry Limited. Mr. Salvatore Armenti, the president and leading force behind Armenti Brothers, testified before the Board. (Interestingly enough, counsel for Local 4 arranged for Mr. Armenti to be subpoenaed to the hearing, but did not call him as a witness. He was called to testify by counsel for Dr. Hillers.) Mr. Armenti testified that on either March 30th or 31st he was informed of the Dr. Hillers job by someone from Beam Ready Mix which had been acting as a materials supplier to the site. On March 31st Mr. Armenti went to see Mr. Meyer, and after reviewing the drawings of the plant reached an agreement with him that Armenti Brothers would construct three exterior walls of ten-inch block and in return receive 70 cents for each block laid. The remaining exterior wall had already been completed by Dr. Hillers' own employees. It was also agreed that Armenti Brothers would commence work on Monday, April 3, although due to inclement weather the Armenti Brothers' crew did not begin work until April 5th. This crew was originally comprised of three men, including Mr. Armenti, although later two men who had previously worked for Armenti were also added to the crew.

20. It was the position of counsel for Local 4 that Armenti Brothers was not an independent contractor but rather a "straw man" for Dr. Hillers, and that the Board should conclude that Mr. Armenti himself was an employee of Dr. Hillers. Armenti Brothers is a small firm which at the relevant time had been in operation for less than a year. It has only a single work crew, and Mr. Armenti, the firm's president, acts as the crew's working foreman. Notwithstanding the limited scope of its operations, however, we are satisfied that Armenti Brothers is a bona fide independent masonry contractor. Prior to arriving on the Dr. Hillers site the firm had undertaken a number of different projects, and, indeed, at times Mr. Armenti would take his crew away from the Dr. Hillers site to work on a townhouse project in Welland. We are also satisfied on the evidence that Mr. Armenti had full control over the hiring and deployment of his work force.

21. An additional masonry contract for certain internal walls was let to a firm called E and D Masonry at a rate of 75 cents per block. No details as to how the contract came about were put before the Board.

22. All of the contracts referred to above were for the work covered by the Cecchini Bros.' bid. Certain additional work, not originally planned for, was also let to Lucato Construction under a second contract with that firm.

23. As a consequence of the letting of the contracts for the block work, there was no longer any need for Dr. Hillers' own crew to perform such work. Mr. Peters testified that on March 29th Mr. Meyer indicated to him that he had given the job away and would probably have to lay some fellows off. This comment would appear to have followed shortly upon Mr. Bayer's agreement to assume some of the work. Two days later, on March 31st, Mr. Meyer entered into the agreement with Mr. Armenti and later that day both Mr. Guillemette and Mr. Kloppenburg were laid off. Mr. Meyer informed Mr. Kloppenburg that the work had been given away to some Italian company from Port Colbourne whose name he could not remember. The remaining employees of Dr. Hillers who were doing block work were not laid off, but rather assigned to non-masonry work. Once they were re-assigned, all of these employees ceased to be employed by Dr. Hillers as bricklayers, and thus no longer came within a bargaining unit of bricklayers and apprentices. When the construction of the plant was completed, all of Dr. Hillers' construction employees were laid off with the exception of Mr. Peters and another employee who were kept on as night watchmen.
24. The first issue to be determined is whether the decision of Dr. Hillers to subcontract out the masonry work and to cease to employ anyone as a bricklayer amounted to a violation of The Labour Relations Act.
25. Section 56 of the Act provides that no employer shall interfere with the selection of a trade union or the representation of employees by a trade union. In seeking to determine whether this prohibition has been breached, a distinction must be drawn between unlawful employer conduct that actually interferes with either the selection of a trade union by employees or the representation of employees by a trade union, and legitimate employer conduct which may have an incidental affect on either union selection or employee representation. The contracting out of work is a common and accepted practice in the construction industry, and at times the practice will adversely affect both employees seeking to select a particular trade union as their bargaining agent, as well as the representation of employees by a trade union. However, to ascertain whether the employer's conduct amounts to the type of interference prohibited by section 56, one must look to see whether the employer's conduct resulted in a substantial disruption in the selection of a trade union by employees, or their representation by a union, and also whether the disruption was the purpose or intent of the employer's actions.
26. At the time that Dr. Hillers ceased to employ anyone as a bricklayer it was aware that Local 4 intended to file an application for certification, although it had not yet received notice of the actual filing of an application. If Dr. Hillers had ceased to employ anyone as a bricklayer prior to the filing of the application, then the application could not have succeeded in that there would not have been any employees to constitute an appropriate bargaining unit. If an application for certification had already been filed prior to Dr. Hillers' actions, but the union's membership position only entitled it to have its support tested in a representation vote (as was in fact the case here), then Dr. Hillers' actions would have resulted in there not being anyone employed as a bricklayer eligible to cast a ballot. If, despite Dr. Hillers' actions Local 4 were certified by the Board, then the lack of anyone employed as a bricklayer would in practical terms have meant there would be no employees in the unit for Local 4 to actually represent.
27. It is undisputed that Dr. Hillers' original intention was to contract out the masonry work. However, prior to Mr. Mollica's appearance on the job site on March 27, 1978,

no thought seems to have been given to any contracting-out arrangement other than to a single contractor under a single contract. When the company decided that all of the single contract bids were too high, the decision was not taken to break the work up among a number of smaller contractors, but rather Mr. Meyer was instructed to do the work with Dr. Hillers' own employees while continuing to look for "a contractor" who could do the work at a lower rate.

28. Once Dr. Hillers' men began to do the work which Mr. Meyer had originally intended to contract out, Mr. Meyer hired two bricklayers to augment the existing blocklaying crew. These new men began to work on March 27, 1978, which strongly suggests that as of that date Mr. Meyer was still contemplating having Dr. Hillers do the work itself. However, only two days later, after Mr. Mollica had indicated that he intended to apply for certification, Mr. Meyer entered into discussions with Mr. Bayer about contracting out the work. The evidence concerning Mr. Meyer's arrangements with Mr. Bayer strongly suggest that the decision to contract out the work to a number of small contractors was made in a hurry following Mr. Mollica's attendance on the job site on March 27th. Mr. Meyer admitted having known Mr. Bayer for a number of years and both of them belonged to the same cultural club, yet prior to March 27th Mr. Bayer was not spoken to about doing any of the work. Further, we feel that the awarding of the contracts to Mr. Bayer was out of character for Mr. Meyer. The evidence makes it clear that Mr. Meyer generally gave careful consideration to bids from prospective contractors. Notwithstanding this fact, Mr. Meyer was willing to enter into a contract with Bayer even though Bayer did not have sufficient forces of his own to do the job, but instead had to sub-contract out the actual performance of some of the work to two other masonry firms. Further, despite Mr. Meyer's obvious concern with getting the best arrangement possible for Dr. Hillers, he awarded the initial contract to Bayer without even first seeking to determine the amount that other small contractors might charge. This latter point is highlighted by Mr. Meyer's action in later bypassing Mr. Bayer and awarding two contracts to Lucato Construction, one of the firms which Mr. Bayer had brought on the site to work on his contracts. Not surprisingly, Dr. Hillers could get the work done at a lower rate by dealing directly with Lucato Construction rather than by dealing with Bayer.

29. The fact that Mr. Meyer hired Mr. Peters and Mr. Kloppenburg, notwithstanding the fact that he knew them to be union members, cannot be ignored in seeking to determine whether Mr. Meyer might have been motivated by anti-union considerations. Balanced against this, however, must be weighed Mr. Meyer's conscious attention to the proportion of his employees who were union members. Indeed, Mr. Meyer himself stated that he was aware that of six employees doing block work, only two were union members.

30. No attempt was made by Dr. Hillers to justify its decision to contract out the block work to a number of small contractors on economic grounds. The Board was not given any final figure as to what the actual cost was to Dr. Hillers for the completion of the work. Nevertheless, on the basis of the information we do have we feel it is reasonable to conclude that the final cost to Dr. Hillers (exclusive of the additional work not contemplated when the original bids were received) was probably somewhat less than the \$66,665.00 bid by Cecchini Bros. However, the decision to break the work up among a number of contracts was not made against the background of the Cecchini Bros.' bid, since a decision had already been made that the bid was too high and that Dr. Hillers' own forces should do the work directly. Thus, any possible savings to Dr. Hillers from breaking up the

work into a number of contracts would have had to result from this manner of proceeding being less expensive than having Dr. Hillers' own crew doing all of the work. At no point did counsel for Dr. Hillers seek to establish such a savings, and, indeed, he did not even contend that such a savings had been achieved. Counsel for Local 4 for his part submitted that the evidence indicated that Dr. Hillers' own employees could lay the blocks for the exterior walls at a total cost of 33 cents per block, as opposed to the lowest contract price of 70 cents per block paid to Armenti Brothers. We find ourselves unable to accept this 33 cent figure simply because there is insufficient evidence before us upon which to seek to calculate the true cost to Dr. Hillers. The most that can be said is that it has not been demonstrated, or even contended, that Dr. Hillers' actions in subcontracting out the masonry work by way of a number of contracts to several subcontractors led to any financial savings.

31. When all of the above considerations are taken into account, we are led to the conclusion that although Dr. Hillers was quite prepared to contract out work to unionized sub-trades when such was directed by economic and other business-oriented considerations, nevertheless, it did not desire to have its own employees represented by a trade union. In consequence of this, once the company became aware of Local 4's intention to apply for certification, Dr. Hillers moved as quickly as possible to contract out its masonry work so that it would no longer have any employees of its own employed as bricklayers. We are satisfied that the purpose and intent of this action was to interfere with the selection of Local 4 by the employees and also, if Local 4 did acquire bargaining rights, to interfere with the representation of employees by the union. As will be detailed later, the result of Dr. Hillers' actions was in fact to substantially disrupt the selection of Local 4 by the employees. In these circumstances we are of the view that Dr. Hillers' actions did amount to the type of interference prohibited by section 56.

32. At the time that Dr. Hillers began to divide up the masonry work, a number of its employees were engaged in the laying of blocks. Most of these men were simply moved off of the blocklaying work and put exclusively on non-masonry work, such that they were no longer employed as bricklayers. Mr. Guillemette and Mr. Kloppenburg, however, were actually laid off. Although the two men had been hired to perform the block work, the decision not to have Dr. Hillers' own men complete the work was motivated by a desire on the part of Dr. Hillers to interfere with the right of these and other employees to belong to Local 4 and to be represented by the union if it met the requirements for certification. In these circumstances we are satisfied that their lay-off amounted to a violation of section 58 of the Act. We are also of the view that had Dr. Hillers not contracted out the work for the unlawful reasons which it did, then both Mr. Guillemette and Mr. Kloppenburg would likely have continued in Dr. Hillers' employ until such time as the blocklaying work was completed. In these circumstances we hereby direct Dr. Hillers to compensate Mr. Guillemette and Mr. Kloppenburg for their loss of earnings and other employment benefits arising out of their being laid off prior to the completion of the block work. The Board will remain seized of this matter in the event that the parties are unable to agree on the amount of compensation involved.

33. As noted above, it was the contention of counsel for Local 4 that Armenti Brothers is not an independent contractor separate and apart from Dr. Hillers. On the basis of this contention it was submitted that Dr. Hillers should be required to compensate a number of bricklayers belonging to Local 4 who were allegedly denied employment by Mr. Armenti because of their union affiliation. The evidence indicates that Mr. Armenti was pre-

pared to hire two of these men on condition that Mr. Mollica sign a document agreeing to allow the men to work for the wages which Armenti Brothers was offering, but that since such a document was not forthcoming the men were not hired. (Interestingly enough, after Armenti Brothers finished working on the Dr. Hillers site, Mr. Armenti and Mr. Mollica entered into an arrangement whereby Local 4 sent one of its members to work for Armenti Brothers on a residential job site.) As previously noted, we are satisfied that Armenti Brothers is an independent contractor quite separate and apart from Dr. Hillers. This being the case, any remedy for any alleged unlawful acts on the part of Armenti Brothers must be directed at that firm and not against Dr. Hillers. This being so, the complaint against Dr. Hillers and Mr. Meyer in File No. 1484-78-U is hereby dismissed.

34. We now turn to consider the application for certification and the Local 4's request that it be certified pursuant to the provisions of section 7a of the Act.

35. Mr. Mollica visited the Dr. Hillers' job site on March 27, 1978. Later that same day he mailed an application for certification to the Board by way of registered mail. Section 102(2) of the Act provides that an application for certification sent by registered mail to the Board "shall be deemed to have been made on the date on which it was so mailed". Thus, due to the promptness with which Mr. Mollica acted following his visit to the job site, and the fact that he sent the application to the Board by way of registered mail, notwithstanding Dr. Hillers' later action in subcontracting out the work, on the application date Dr. Hillers did employ a unit of bricklayers and both Mr. Guillemette and Mr. Kloppenburg were employees within the unit. The fact that shortly after the filing of the application Dr. Hillers ceased to employ anyone as a bricklayer, and at the present time does not employ anyone as a bricklayer, does not by itself mean that the Board should not issue a certificate. Indeed, the Board's longstanding approach in the construction industry has been not to refuse to issue a certificate only because the employer involved does not have any employees in the bargaining unit. Rather, the question which the Board addresses itself to is whether there were any employees in the bargaining unit on the date of the making of the application. In this regard see both section 7 of the Act and also *Traucott Construction Limited*, [1967] OLRB Rep. Feb. 920.

36. In response to the application for certification Dr. Hillers filed with the Board a list of the names of seven employees who it contended were employed as bricklayers and apprentices on the application date. Local 4 challenged the number of employees on the list, contending that the list should contain only five names, and as a result a Labour Relations Officer was appointed to inquire into the matter. Following the release of the Officer's report and a hearing before the Board, the Board determined a list of six individuals who had been employed within a bargaining unit of bricklayers and bricklayers' apprentices on the relevant date. The applicant filed evidence of membership on behalf of three of these employees. Section 7 of the Act provides that in situations such as this, where a union has filed evidence of membership on behalf of more than forty-five but less than fifty-five per cent of the employees in a bargaining unit, then, absent any consideration of section 7a, the union can be certified only if more than fifty per cent of the ballots cast in a representation vote are cast in its favour. In this case no representation vote was directed because of Local 4's request that it be certified outright pursuant to the provisions of section 7a. It should be noted that if the Board had directed the taking of a vote there would not in fact have been anyone employed as a bricklayer within the bargaining unit qualified to cast a ballot.

37. Section 7a of the Act provides as follows:

Where an employer or employers' organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

38. We have already concluded that Dr. Hillers did contravene both sections 56 and 58 of the Act. However, as the wording of the section makes clear, a contravention of the Act is not by itself a sufficient basis for the Board to apply section 7a. Rather, the contravention must have resulted in a situation where the true wishes of the employees are not likely to be ascertained. Further, the Board must also be of the opinion that the union has membership support adequate for the purposes of collective bargaining.

39. Had Dr. Hillers' own employees continued to perform the blocklaying work there would have been sufficient time prior to the completion of the work in which the Board could have directed and conducted a representation vote. As it is, however, the action of Dr. Hillers in contracting out the work resulted in there being no employees in the bargaining unit at the time that the vote would have been conducted. Currently only two of the men who performed the blocklaying work have any continuing connection with Dr. Hillers, and that is in the capacity of night watchmen. Taking these considerations into account, not only is it impossible to ascertain the wishes of bricklayers currently in the employ of Dr. Hillers, but we feel it would not be reasonable in this case, even assuming it might be under other circumstances, to now seek to ascertain from those who were employed as bricklayers how they likely would have voted if a representation vote had been held in the normal course of events. Accordingly, we are satisfied that the unlawful actions of Dr. Hillers' served to destroy the normal certification process such that the true wishes of employees of Dr. Hillers in the bargaining unit cannot be ascertained.

40. This then brings us to the final prerequisite for the application of section 7a, namely, that "in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining". At the time of the filing of the application for certification Local 4 had fifty per cent of the employees in the bargaining unit as members. However, from on or about April 5, 1978 to the present day there have not been any employees in the bargaining unit. We do not, however, feel that the lack of any employees in a construction industry bargaining unit need necessarily prove fatal to the application of section 7a. Because of the relatively short term nature of most construction industry projects, it is not at all unusual for there not to be employees in a bargaining unit at the time that a collective agreement is negotiated. Section 110 of the Act recognizes this fact by providing that in the construction industry a trade union and an employer may enter into a valid collective agreement notwithstanding the absence of any employees in the bargaining unit. In these circumstances, we are satisfied the current lack of employees in the bargaining unit will not detrimentally effect collective bargaining. In light of this conclusion, and taking into account the fact that at the time of the filing of the application for certification fifty per cent of the employees in the bargaining unit were members of Local 4, it is our opinion that Local 4 has membership support adequate for the purposes of collective bargaining. Accordingly, we are of the view that this is an appropriate case for the application of section 7a.

41. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.

42. The Board further finds that this is an application for certification within the meaning of section 108 of The Labour Relations Act.

43. The Board further finds that all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of Dr. Hillers Peppermint Canada Limited in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

44. Pursuant to the provisions of section 7a of the Act, in File No. 1989-77-R a certificate will issue to the applicant trade union.

45. In light of the remedial nature of this decision, we are of the view that no useful collective bargaining purpose is likely to be served by the institution of a prosecution against either Dr. Hillers or Mr. Meyer. Accordingly, the application for consent to institute a prosecution in File No. 0247-78-U is hereby dismissed.

2077-78-R Labourers' International Union of North America, Local 183, (Applicant), v. **Duncanwoods Realty Limited**, (Respondent).

Appropriateness – Bargaining Unit – Certification – Separate full-time and part-time bargaining units not appropriate in exceptional circumstances

BEFORE: R.A. Furness, Vice-Chairman, and Board Members C. Ballentine and C.G. Bourne.

APPEARANCES: *Brian Yandell and Tony Spada for the applicant; W.J. McNaughton and D. Akirov for the respondent.*

DECISION OF THE BOARD; May 28, 1979

1. The name: "Duncanwoods Realty Ltd." appearing in the style of cause of this application as the name of the respondent is amended to read: "Duncanwoods Realty Limited".

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.

3. The applicant is seeking certification with respect to a bargaining unit of all employees of the respondent engaged in cleaning and maintenance at 25 Duncanwoods Drive, Weston, Ontario, including resident superintendents, including part time work, save and except property manager, office and clerical staff.

4. The respondent acknowledges that, apart from the reference to “including part time work”, the applicant is seeking certification for what has become in recent years a standard bargaining unit with respect to employees in the field of cleaning and maintenance. However, the respondent takes the position that there are two bargaining units appropriate for collective bargaining, namely, (i) all employees of the respondent engaged in cleaning and maintenance at 25 Duncanwoods Drive, Weston, Ontario, including resident superintendents, save and except property manager, office and clerical staff and persons employed for less than twenty-four hours per week, and, (ii), all employees of the respondent engaged in cleaning and maintenance at 25 Duncanwoods Drive, Weston, Ontario, employed for less than twenty-four hours per week, save and except property manager, office and clerical staff.

5. There are two employees who are affected by this application – a resident superintendent, who is a full-time employee, and a cleaner who is regularly employed for not more than twenty-four hours per week. There would be two employees in the bargaining unit proposed by the applicant. On the other hand, there would be only one employee in each of the two bargaining units proposed by the respondent. If the applicant’s bargaining unit is appropriate for collective bargaining then the applicant would be entitled to a certificate. If the respondent’s two bargaining units are appropriate for collective bargaining then, by virtue of section 6(1) of the Act, this application would be dismissed.

6. The respondent cited the following cases in support of its position that two bargaining units and not one bargaining unit is appropriate for collective bargaining: *Premier Plastics Limited* [1969] OLRB Rep. 508; *Adams Furniture Co. Limited* [1975] OLRB Rep. 491; *The Board of Education for the City of Toronto* [1970] OLRB Rep. 430; *The Essex County Humane Society* [1969] OLRB Rep. 391; *H. Gray Limited* 55 CLLC ¶18,011; *Brinks Express Company of Canada Limited* [1970] OLRB Rep. 502; *Vermilion Bay Co-operative Limited* [1970] OLRB Rep. 920; *Canadian Air Flight Attendants’ Association* [1975] OLRB Rep. 896 and *Kenmount Holdings Ltd* [1976] OLRB Rep. 839.

7. None of the foregoing cases support the respondent’s position that two bargaining units are appropriate for collective bargaining in the circumstances of this application. While it is the Board’s usual practice to exclude persons regularly employed for not more than twenty-four hours per week from bargaining units of full-time employees at the request of either party, such persons are normally eligible to be included in a separate bargaining unit. In the instant case, there is one full-time employee and one part-time employee. Where there is only one part-time employee and such an employee desires to be represented in collective bargaining, it is the practice of the Board to include such an employee in a bargaining unit together with full-time employees. See, for example, *The Essex County Humane Society* case, *supra*. Similarly, where there is one full-time employee and such an employee desires to be represented in collective bargaining, it is also the practice of the Board to include such an employee in a bargaining unit together with part-time employees. See, for example, the *Brinks Express Company Canada Limited* case, *supra*. The Board in such circumstances views the existence of one full-time or one part-time employee as a most exceptional circumstance and considerations of representation versus no representation take precedence over what would normally be an exclusionary approach based upon a concept of a different community of interest. See the *H. Gray Limited* case, *supra*.

8. In the instant case the existence of one full-time employee and one part-time em-

ployee is a most exceptional circumstance. Since both employees desire to be represented by the applicant, the Board finds that both employees together are appropriate for inclusion in one bargaining unit.

9. Having regard to the foregoing, the Board further finds that all employees of the respondent engaged in cleaning and maintenance at 25 Duncanwoods Drive, Weston, in Metropolitan Toronto, including resident superintendents, save and except property manager, office and clerical staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

10. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on March 26, 1979, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

11. A certificate will issue to the applicant.

1415-78-R 1416-78-R 1417-78-R 1418-78-R 1419-78-R Labourers' International Union of North America; Labourers' International Union of North America, Ontario Provincial District Council; and Labourers' International Union of North America, Local 1059; International Association of Bridge, Structural and Ornamental Ironworkers; Ironworkers District Council of Ontario; and The International Association of Bridge, Structural and Ornamental Ironworkers, Local 700; The United Brotherhood of Carpenters and Joiners of America, The Ontario Provincial Conference of the United Brotherhood of Carpenters and Joiners of America and United Brotherhood of Carpenters and Joiners of America, Local 1946; The International Union of Bricklayers and Allied Craftsmen, The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, and The International Union of Bricklayers and Allied Craftsmen, Local 5; The International Union of Operating Engineers, Local 793 of The International Union of Operating Engineers, (Applicants), v. **Evans-Kennedy Construction Limited**, and Celtic Construction (London) Ltd., (Respondents).

Related Employer – two companies owned by unrelated persons – one company investment vehicle for sole shareholder – both companies under common direction not common control – section 1(4) applicable

BEFORE: Ian C. A. Springate, Vice-Chairman, and Board Members H. J. F. Ade and O. Hodges.

APPEARANCES: *S. B. D. Wahl, J. Harrower, D. Vasseur, R. Walsh, K. Jackson and F. Colver for the applicants; T. D. Little and P. J. Quigley for Evans-Kennedy Construction Limited; Kenneth V. Duggan and Klemens Macugajlo for Celtic Construction (London) Ltd.*

DECISION OF THE BOARD; May 16, 1979

1. These are a number of related applications in which it is contended that there has been a sale of a business from Evans-Kennedy Construction Limited ("Evans-Kennedy") to Celtic Construction (London) Ltd. ("Celtic") within the meaning of section 55 of The Labour Relations Act or, in the alternative, that the two companies should be treated as constituting one employer pursuant to section 1(4) of the Act. We would note at the outset that we do not regard section 55 as being applicable to the facts before us.

2. Evans-Kennedy is a London-based company which carries on business as a general contractor in the industrial, commercial and institutional sector of the construction industry. The firm, which was incorporated in 1964, utilizes its own employees to perform excavation, carpentry and masonry work, but contracts out most other work. The president, secretary and major shareholder of Evans-Kennedy is Mr. John Kennedy. Mr. Kennedy's wife holds all of the remaining shares of the firm although she plays no active role in its operation. At one time Mr. Evans and his wife were part owners of the firm, but their shares

were conveyed to Mr. Kennedy prior to the events giving rise to these applications. Evans-Kennedy is bound to collective agreements with the various applicant trade unions.

3. Celtic also acts as a general contractor in the industrial, commercial and institutional sector of the construction industry. Most of the work it acquires is contracted out although it does perform certain work with its own employees. The sole officer and shareholder of Celtic is Ms. A. W. Potter. Ms. Potter in testifying before the Board indicated that she is an employee of a company in the communications industry, that she knows very little about the construction industry and that she plays no active role in Celtic's affairs. Ms. Potter's testimony revealed an almost total lack of knowledge concerning Celtic's operations.

4. It is admitted that there is a very close personal relationship between Mr. Kennedy and Ms. Potter. This relationship in large measure explains Ms. Potter's involvement in Celtic. Ms. Potter testified that it was on Mr. Kennedy's advice that she decided to invest in a construction company. The incorporation of Celtic was arranged by Mr. Kennedy. When questioned as to the events surrounding the actual incorporation, Ms. Potter's response was that such information would have to be obtained from Mr. Kennedy. Ms. Potter was quite candid in acknowledging that she regarded her ownership of Celtic solely as an investment, and that she had been assured by Mr. Kennedy that she would not lose any money. When questioned as to the manner in which it was assured that Celtic would not lose any money, Ms. Potter's reply was "I don't really know, you will have to ask Mr. Kennedy".

5. Ms. Potter's only major act relating to Celtic's operation was to hire Mr. K. Macugajlo as the firm's general manager for construction. This course of action was recommended to her by Mr. Kennedy. Mr. Macugajlo had previously been a field superintendent for Evans-Kennedy, and as such had responsibility for the hiring and firing of staff and for co-ordinating the activity of subcontractors. This was generally the same type of work which Mr. Macugajlo came to perform for Celtic.

6. When it commenced operations, and at the time of the filing of these applications, Celtic had no office of its own but instead used the offices of Evans-Kennedy, for which it paid no rent. Celtic also used the same post office box and telephone number as Evans-Kennedy. The only employee of Celtic's actually working in the Evans-Kennedy office was Mr. Barry Kennedy, who is Mr. Kennedy's son. Barry Kennedy's job was to keep a record of the time worked by Celtic's employees and to issue pay cheques. All of the other accounting and administrative duties involved in Celtic's operation were performed by Evans-Kennedy personnel. At the hearing the Board was informed that as of January 1979 Celtic had moved to its own office. There is nothing before us to indicate that this move was accompanied by a change in the manner in which the affairs of Celtic were being conducted.

7. Celtic's first major project was as the general contractor on the construction of a pre-engineered building for London Compressed Air Equipment Ltd. London Compressed Air had originally approached Evans-Kennedy about doing the work, but in discussions with Mr. Hoelzl of London Compressed Air, Mr. Kennedy proposed that Celtic bid on the work. On February 16, 1978 a formal bid was submitted to London Compressed Air over Mr. Kennedy's signature. The bid was on Evans-Kennedy letterhead, although under the heading had been typed the words "Management agents for Celtic Construction (London) Ltd.". All of the estimating work and preliminary drawings done in preparing the bid were

performed by Evans-Kennedy personnel. There is no suggestion that anyone other than Mr. Kennedy was involved in, or consulted about, the decision to have the bid placed in the name of Celtic or that anyone other than Mr. Kennedy and his staff were involved in determining what the amount of the bid should be.

8. On June 5, 1978, Mr. Hoelzl met with Mr. Kennedy and signed a brief handwritten acceptance of the bid. The acceptance is headed up "To Evans-Kennedy". Below this, in a different colour of ink, is the phrase "& Celtic". When being cross-examined on the matter, Mr. Kennedy stated that the reference to Celtic might well have been added at some later point in time. Subsequent to the signing of the acceptance by Mr. Hoelzl, Mr. Macugajlo signed a purchase order on behalf of Celtic addressed to Evans-Kennedy for the supply of management services on the London Compressed Air site.

9. Mr. Macugajlo was in charge of the actual London Compressed Air construction site and, as such, he performed those duties normally associated with a site superintendent. Most of the work on the site was contracted out, there being in excess of twenty subcontractors involved. Mr. Kennedy personally decided what work was to be contracted out and to what contractors. All of the contracts were let through Evans-Kennedy purchase orders and all of the subcontractors were paid by Evans-Kennedy cheques. Evans-Kennedy was responsible for all purchasing for the job and its staff did all of the related accounting work. The site office was an Evans-Kennedy construction trailer with its markings painted over. Evans-Kennedy equipment still bearing the company's name was used on the site, although no special charge was made to Celtic for its use. Payment by London Compressed Air for the work performed was made to Evans-Kennedy.

10. This same general manner of operation was used for a second major project involving Celtic, namely, the construction of a terminal for Reimer Express Lines Ltd., as well as for a number of smaller jobs. In each case the bid was prepared by Evans-Kennedy personnel and presented to the owner-client by Evans-Kennedy as management agents for Celtic. The letting out of work was done by Mr. Kennedy, and it was Evans-Kennedy which paid the subcontractors and material suppliers. Interestingly enough, a number of bricklayers in the direct employ of Evans-Kennedy worked on the Reimer site under the terms of a labour only masonry subcontract let by Celtic to Evans-Kennedy. Mr. Kennedy was the one who decided that Evans-Kennedy should be the masonry contractor rather than some other firm.

11. Mr. Kennedy described the financial arrangement between Evans-Kennedy and Celtic as being "cost plus with a guaranteed upset". He explained that under this arrangement Evans-Kennedy would be reimbursed by Celtic for its costs and also receive a percentage markup, although on any particular job Celtic would not be required to pay Evans-Kennedy any amount greater than the receipts from the owner-client. In other words, if there were to be any loss resulting from a particular construction project, the loss would be borne entirely by Evans-Kennedy. Mr. Kennedy also indicated that if a bid placed by Evans-Kennedy as management agent for Celtic was not accepted, then Evans-Kennedy would not be reimbursed for the costs it incurred in preparing the bid.

12. Mr. Macugajlo did place two bids directly in Celtic's name. One of the jobs was for \$8,000.00 and the other for \$6,000.00. We were not informed as to whether or not the bids were successful, however, assuming that both bids were accepted, the two jobs together

would have accounted for less than two per cent of Celtic's total revenue of \$734,000.00. Celtic entered into one contract for a major job in its own name for certain work for The Robert Hunt Company Ltd., although the understanding was that Evans-Kennedy would act as Celtic's management agent. Mr. Kennedy acknowledged that Evans-Kennedy did all of the administrative work connected with the job and did not dispute the suggestion that he personally had been telephoned by the Hunt Company and asked if Celtic would bid on the job. Mr. Kennedy further indicated that the bid was placed directly with Celtic since the Hunt Company did not want to deal with a unionized firm. Celtic was not the general contractor on the Hunt site, but rather a subcontractor retained by Hunt to perform certain cement and masonry work.

13. Mr. Macugajlo testified that the original intention had been for Celtic to do the masonry work on the Hunt site with its own employees. The understanding was that bricklayers would be hired by and work under the direction of Mr. Walter Mueller, a bricklayer who at all relevant times was on the Evans-Kennedy payroll. On July 8, 1978, an ad appeared in the employment want ads of a local newspaper which read as follows: "Bricklayers, Celtic Construction London Ltd. at Hunt Windows, Wilton Grove Rd.". A number of men who responded to this ad were hired by Mr. Mueller to work for Celtic.

14. On July 11, 1978, Mr. Macugajlo went to the Hunt job site and became aware of the fact that the bricklayers hired by Mr. Mueller were all union members. Mr. Macugajlo then proceeded on behalf of Celtic to issue a purchase order to Evans-Kennedy for "all loan labour of bricklayers, all as requested". When asked what his purpose had been in doing this, Mr. Macugajlo responded that it was done to avoid a certification since Celtic did not want to be a union shop. Two days later, on July 13, 1978, an application for certification was filed by the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen wherein it sought to be certified to represent a unit of bricklayers in the employ of Celtic. On July 19, 1978, Mr. Kennedy met with all of the bricklayers on the Hunt site and explained that henceforth they would be working for Evans-Kennedy. The following day, July 20th, a reply to the application for certification was filed by Celtic over the signature of Mr. Macugajlo which indicated that on July 13th, the application date, Celtic had no bricklayers in its employ. The Board issued a decision with respect to this application on August 3, 1978. In that decision the Board dealt only with a single issue, namely, the quality of the membership evidence filed in support of the application. It was the Board's opinion that the form of the membership evidence was defective, and on this basis the Board dismissed the application. On August 30, 1978 the Ontario Provincial Conference again applied to be certified for bricklayers in Celtic's employ. Again the response of Celtic was that on the application date it employed no bricklayers. After seeking legal advice, on September 20, 1978 the Ontario Provincial Conference withdrew its application for certification.

15. The applicants initially became aware of Celtic's activities in June of 1978 when the London District Building Trades Council, to which the local unions are affiliated, received the Southam Building Reports relating to the London Compressed Air job. The possibility of a link between Evans-Kennedy and Celtic was discussed at a number of meetings of the Building Trades Council, and in July or August of 1978 the president of the Council sought legal advice on the matter. On the basis of this advice certain additional information was gathered by the Council. This information, together with the events surrounding the bricklayers' certification applications, prompted the filing of these applications on November 20, 1978.

16. Section 1(4) of the Act provides as follows:

Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

17. Both Evans-Kennedy and Celtic act as general contractors in the industrial, commercial and institutional sector of the construction industry. Both do some work directly with their own employees while contracting out certain other work. Both have acted as a masonry subcontractor. On these facts we are satisfied that the two corporations are carrying on associated or related activities or businesses.

18. Mr. Kennedy and his wife own all of the shares of Evans-Kennedy while Ms. Potter is the sole shareholder of Celtic. Thus it cannot be said that the ultimate control of the two companies is to be found at a common source. The direction of the two companies, however, is another matter. Mr. Kennedy clearly directs the affairs of Evans-Kennedy. Not only does he hold a majority of shares in the firm, but he is also its president and makes all major decisions affecting it. Ms. Potter is the sole shareholder and officer of Celtic. However, she plays absolutely no role in the operations of the company, but instead, leaves the running of the business to Mr. Kennedy. She views her involvement as being that of an investor who can lose no money. It is Mr. Kennedy who decides what work Celtic will bid on and at what price, and also what work is to be contracted out and to what contractors. Celtic's field forces are directed by Mr. Macugajlo, but in the main Mr. Macugajlo's duties are the same as those he performed as a field superintendent for Evans-Kennedy. We are satisfied that in practical terms Celtic is not under the direction of either Mr. Potter or Mr. Macugajlo, but rather under the direction of Mr. Kennedy. This being the case, it follows that we are satisfied that both Evans-Kennedy and Celtic are under the common direction of Mr. Kennedy.

19. On the basis of our conclusions set out above, we are satisfied that Evans-Kennedy and Celtic are two corporations carrying on associated or related activities or businesses under common control, and that as such they meet the statutory requirements for the application of section 1(4). Notwithstanding this fact, however, there still remains the question as to whether or not this is a proper case for the Board to proceed to apply the section.

20. The Board regards one of the purposes of section 1(4) as being to protect existing bargaining rights from being undermined by a unionized firm directing work to a related non-union firm. (See *Farquhar Construction Limited*, [1978] OLRB Rep. Oct. 914.) Further, although the non-union firm may have hired employees to perform the work, in our view, if a trade union acts reasonably promptly to secure its bargaining rights, then the rights of the trade union should generally take priority over whatever may be the views of these employees regarding union representation. As the Board indicated in the *Farquhar* case, *supra*, the position of these employees may be likened to that of employees hired as a result of a post-

certification buildup of an employer's work force. While they may not desire collective bargaining, or may even desire to be represented by another trade union, the existing structure is the one which has been established to govern their employment relations, at least until such time as an application to terminate or displace bargaining rights is timely. However, where a union, for reasons of its own, stands by and does not seek to protect its bargaining rights while a non-union work force is assembled and employed for a considerable period of time, then the wishes of those employees does become a relevant consideration. The application of section 1(4) in such a situation may well result in a union expanding existing bargaining rights or re-acquiring bargaining rights long since abandoned, notwithstanding the fact that the union may lack support among the employees who would reasonably have assumed that the union was not their bargaining agent. In such situations the Board's practice has been to decline to apply section 1(4) and to indicate that if the union desires bargaining rights for the non-union employees it should seek to obtain them through the regular certification procedures. (See *Ellwall and Sons Construction Limited*, [1978] OLRB Rep. June 535.)

21. It is the position of both of the respondents that in these proceedings the applicants are attempting to apply section 1(4) as a means of expanding their bargaining rights whereas they should instead be seeking to become certified on behalf of the employees of Celtic. It is our view, however, that the applicants are not seeking through this application to either obtain new bargaining rights or to re-acquire bargaining rights abandoned in the past. Instead, we are satisfied that they are seeking only to ensure that their existing bargaining rights with respect to Evans-Kennedy are not eroded away by the direction of work from Evans-Kennedy to Celtic. Further, we are satisfied that the result of having the Board apply section 1(4) would essentially be to protect the applicants' existing bargaining rights. As for the respondents' contention that the applicants should rely upon the certification process to obtain bargaining rights for employees of Celtic, that is an argument which rings somewhat hollow. There is no question but that the bricklayers in Celtic's employ were transferred to Evans-Kennedy's payroll for the sole purpose of avoiding a certification of Celtic's employees. In other words, the common direction of the two firms was used to frustrate the very process which the respondents' claim the applicants should now be seeking to utilize. In our view, this is in fact a proper case in which to apply section 1(4).

22. At the hearing counsel for Evans-Kennedy took the position that if the Board did apply section 1(4) it should be limited only to bricklayers in Celtic's employ since attempts had been made to organize only the bricklayers. We are satisfied, however, that the nature of the relationship between Celtic and Evans-Kennedy is such as to imperil the bargaining rights of all of the applicants, and further that each of the applicants has acted in a relatively prompt manner to ensure that its bargaining rights are not eroded away. Accordingly, we are of the view that the section 1(4) declaration should not be limited solely to bricklayers.

23. In consequence of the above, and pursuant to section 1(4) of the Act, the Board will treat Evans-Kennedy and Celtic as constituting one employer for the purpose of The Labour Relations Act. The Board also declares that Celtic is bound by the same collective agreements as are the applicants and Evans-Kennedy.

1945-78-R International Association of Heat and Frost Insulators and Asbestos Workers', Local 95, (Applicant), v. **R. N. Flynn Insulations Limited**, and Per-Fec-Tion Insulations Limited, (Respondents), v. Construction Workers, Local 6, affiliated with Christian Labour Association of Canada, (Intervener).

Practice and Procedure -- Related Employer -- Respondent and intervener having similar interest -- respondent adducing evidence first -- whether intervener or applicant proceeding next

BEFORE: R. A. Furness, Vice-Chairman, and Board Members H. J. F. Ade and C. Ballentine.

APPEARANCES: *S. B. D. Wahl, M. Paperny and J. Duffy for the applicant; C. E. Humphrey for Per-Fec-Tion Insulations Limited; R. N. Flynn for R.N. Flynn Insulations Limited; Owen Gray, Ed Vanderkloet and Jack Wagensveld for the intervener.*

DECISION OF THE BOARD; May 28, 1979

1. The Board ruled at the hearing that it would inquire into the allegations of the applicant with respect to sections 55 and 1(4) of the Act before proceeding with a request to reconsider the issuance of a certificate to the Christian Trade Unions of Canada (Local 6) in Board File No. 1769-78-R.
 2. The respondent has adduced evidence before the Board with respect to sections 55 and 1(4). The applicant and the intervener disagree with respect to which of them should next adduce evidence with respect to sections 55 and 1(4) of the Act.
 3. In our opinion, the respondent and the intervener have both asserted positions with respect to sections 55 and 1(4) which are both similar and in opposition to the position asserted by the applicant. In these circumstances, it is the ruling of the Board that the applicant should not be called upon to adduce its evidence until it has heard the evidence of the intervener. It is only at this point that the applicant is able to assess its position with respect to the case it has to meet with respect to sections 55 and 1(4).
 4. The intervener is required to adduce any evidence it may wish to present before the Board with respect to sections 55 and 1(4) before the applicant is called upon to adduce any evidence that it may wish to present to the Board with respect to sections 55 and 1(4).
 5. The matter is referred to the Registrar to be listed for continuation of hearing.
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0150-79-R 0153-78-R Hotels, Clubs, Restaurants, Tavern, Employees' Union, Local 261, (Applicant), v. **Fuller's Restaurant**, (Respondent), v. Group of Employees, (Objectors).

Certification – Petition – Practice and Procedure – Document not disclosing opposition to Union – Board refusing to admit oral evidence to vary or amend petition

BEFORE: M. G. Picher, Vice-Chairman, and Board Members M. J. Fenwick and E. C. Went.

APPEARANCES: *Alik Ryder, Thomas L. Rees, Eleanor S. Dunn, Denis Saumure and Frank Grella for the applicant; Philip J. Wolfenden, Peter T. Main, and David G. Leafloor for the respondent; Michael Gordon, Carmen Fisher, Bonnie Bellefeuille and Marion Eveline for the objectors.*

DECISION OF THE BOARD; May 28, 1979

1. The Board directs that the above applications be and the same are hereby consolidated.
2. These are applications for certification.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.
4. Having regard to the agreement of the parties, the Board further finds that:

all employees of the respondent working at 809 Richmond Road, Ottawa, Ontario, save and except assistant managers, management trainees, kitchen managers and persons above those ranks, office staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining (hereinafter referred to as bargaining unit #1).

and that:

all employees of the respondent working at 809 Richmond Road, Ottawa, Ontario, who are regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except assistant managers, management trainees, kitchen managers and persons above those ranks and office staff, constitute a unit of employees of the respondent appropriate for collective bargaining (hereinafter referred to as bargaining unit #2).

5. A group of employees filed a petition with the Board. The letter accompanying the petition describes that document as intended to represent the employees who oppose the union.

6. The petition is a single page document bearing the signatures of twenty-one of the thirty-seven employees in both bargaining units. It bears the following handwritten preamble:

“Fullers [sic] Restaurant Richmond Rd. Ottawa
May 1/79

The undersigned people are petitioning the Hotels, Clubs, Restaurant, Taverns Employees Union Local 261.”

7. On its face the petition tendered to the Board is not a clear statement in opposition to the certification of the applicant union. The issue, therefore, is whether it is admissible as an expression of opposition to the union by the employees who signed it. A related issue is whether the Board should entertain *viva voce* evidence to vary, supplement or contradict the meaning of the preamble.

8. The form which evidence of membership in a trade union or objection by employees to certification must take is a matter within the discretion of the Board. Section 92(2)(j) of The Labour Relations Act provides:

(2) Without limiting the generality of subsection 1, the Board has power,

(j) to determine the form in which and the time as of which evidence of membership in a trade union or of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union shall be presented to the Board on an application for certification or for a declaration terminating bargaining rights, and to refuse to accept any evidence of membership or objection or signification that is not presented in the form and as of the time so determined.

9. Section 48 of the Board's Rules of Procedure provides:

48(1) Evidence of membership in a trade union or of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union shall not be accepted by the Board on an application for certification or for a declaration terminating bargaining rights unless the evidence is in writing, signed by the employee or each member of a group of employees, as the case may be, and,

(a) is accompanied by,

(i) the return mailing address of the person who files the evidence, objection or signification, and

(ii) the name of the employer; and

(b) is filed not later than the terminal date for the application.

(2) No oral evidence of membership in a trade union or of objection by

employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union shall be accepted by the Board except to identify and substantiate the written evidence referred to in subsection 1.

10. Two important considerations in certification proceedings are confidentiality and expedition. A group of employees who have been the subject of a certification campaign may maintain or lose confidence in their union depending on how long it takes the union to obtain its Board certificate and begin to bargain effectively on their behalf. It is with that labour relations reality in mind that the Board has exercised its mandate to fashion procedures that will expedite certifications while respecting the secrecy of the wishes of individual employees.

11. It would obviously be both impracticable and undesirable for the Board to hear oral evidence from each and every employee as to his wishes in respect of union representation. The Board has therefore evolved a procedure whereby membership application documents signed by employees are accepted as evidence of employee support of a union's application. The membership application forms of the employees are necessarily a form of hearsay evidence, and since they are not disclosed to the employer and there is no opportunity to cross-examine upon them the Board has been required to apply stringent standards to insure the integrity and reliability of that evidence.

12. The same considerations apply to evidence in opposition to an application for certification. The interests of time and confidentiality require that employees who wish to object to certification file a statement in opposition to certification in writing and signed by each of them. Three requirements must be met by the document submitted: *firstly*, it must meet the requirements of form and timeliness set out in section 48(1)(a) and (b) of the Board's Rules of Procedure; *secondly*, it must have enough signatures of employees on whose behalf membership evidence was previously filed to call into question the true intention of those employees at the terminal date set for the application; *thirdly*, it must be proved to be the voluntary expression of the employees who signed it having regard to the circumstances of its origination and circulation. (*The Diebold Company of Canada Limited* [1967] OLRB Rep. May 237 at 240).

13. As section 48(2) of the Board's Rules provides, oral evidence may be adduced only to identify and substantiate the written evidence filed in opposition to certification. Identification is accomplished by the direct evidence of a representative of the employees who can confirm, under oath, that the document in the Board's hands emanates from the employees whose names appear upon it. The term "substantiate" in section 48(2) of the Rules of Procedure generally limits that testimony to direct oral evidence respecting the origination and circulation of the petition that will meet the requirements of section 48(5) of the Rules and satisfy the Board that the document represents the free and voluntary wishes of the employees who signed it.

14. In accepting written statements in opposition to a trade union the Board has been mindful that they are often drafted by laymen uninitiated in the technical requirements of the Board's practice. Thus it has admitted statements of desire both in opposition to certification and in support of the termination of bargaining rights where there has been a defect in the document such as a technical irregularity relating to the name of the employer or the

union. (see e.g. *Genwood Industries* [1976] OLRB Rep. 417; *Armbro Materials and Construction Ltd.*, [1967] OLRB Rep. 743; *Glen Agar I.G.A.* [1970] OLRB Rep. 209).

15. Different considerations arise, however, when a petition filed does not on its face express clear and unequivocal opposition to a trade union's application for certification. That is the situation in this case. Whatever may have been the intention of the authors of the petition in the instant case, they did not obtain the signatures of employees on a petition that is clearly, or even indirectly, against the union. Through their counsel the sponsors of the petition sought leave to adduce oral evidence to show that notwithstanding its preamble the document was in fact intended to represent the employees' opposition to the certification of the union.

16. To allow that would be to render meaningless the requirements of section 48 of the Board's Rules. It would, moreover, defeat the purpose of expedition and confidentiality that the Rules of Procedure were designed to protect. Just as a union seeking certification must file clear and unequivocal documents of membership which conform to the Board's standards, employees opposing the union must file a clear and unequivocal written statement of desire in opposition to the union. In this case the requirement of a written statement of desire in opposition to certification has not been met. The Board therefore declined, at the hearing, to admit the petition or oral evidence that would, in effect, amend or vary its preamble.

17. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in bargaining units #1 and #2 at the time the application was made, were members of the applicant on May 2, 1979, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

18. A certificate will issue to the applicant with respect to bargaining unit #1 and bargaining unit #2.

0905-78-M Graham Food Products Limited, trading as **Hickeson-Langs Supply Company**, (Employer), v. Teamsters Union Local 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union 141, (Trade Unions).

Collective Agreement – Reference – Whether document comprises one or two collective agreements – Whether failure to ratify by one local – Whether no agreement in whole or in part. (Dissent of Board Member B. Lee, Majority decision report [1978] Nov. O.L.R.B. Rep. 996)

BETWEEN: Rory F. Egan, Alternate Chairman, and Board Members H. J. F. Ade and Bruce K. Lee.

DECISION OF BOARD MEMBER BRUCE K. LEE:

1. In its decision in this matter dated November 7, 1978 the Board noted that Board member, Bruce K. Lee, was dissenting with reasons to follow. Mr. Lee's reasons for dissent are set out below:

1. I dissent.
2. Once a bargaining agent is certified to represent a certain bargaining unit, it is free to alter that description of the bargaining unit, by agreement with the employer, so as to expand or contract it. It is also open to two bargaining agents to bargain jointly for a single bargaining unit and collective agreement, by forming a council of trade unions. (Section 43(4), *Ontario Labour Relations Act*.) Similarly, two employers can bargain with a trade union with regard to a bargaining unit consisting of the employees of both employers. (Section 43(1), *Ontario Labour Relations Act*; see also *Beverage Dispensers and Culinary Workers Union, Local 835 et al v. Terra Nova Motor Inn Ltd.*, (1975) 50 D.L.R. (3d) 253 (S.C.C.).)
3. In my view of this case, it is clear that we are dealing with a single bargaining unit. The last three collective agreements were achieved through negotiations in which the two locals bargained jointly to reach a single collective agreement defining one bargaining unit covering the employees at both London and Toronto, and describing the bargaining agent as Local 419 and 141 "*collectively* called the Union" (emphasis added). I find that, by that history, the parties have merged the two bargaining units into one and that the two locals are an uncertified council of trade unions for the purposes of bargaining with this employer. Section 1(1)(g) of the Act defines a "council of trade unions" so as to include an "association of trade unions."
4. I find that during the current negotiations the single bargaining unit and the council of trade unions continued in existence, as

they must until the parties agree otherwise, or one of the trade unions leaves the council after the expiry of the prior agreement. That has not occurred in this case. This conclusion is reinforced by the fact that the unions have again bargained jointly and agreed to a single memorandum of settlement which refers to "the" collective agreement, and embodies by reference the same definition of the bargaining unit as in the old agreement. It is not unusual to find separate seniority lists by department or location in a collective agreement, and it is eminently reasonable in a bargaining unit consisting of employees living and working in locations a substantial distance apart. It is reasonable to conclude that the parties intended to distinguish between a "Branch" and the bargaining unit since they used different words to describe the two.

5. The result in this case is unfair to the trade unions. The employer should not be allowed to avoid the memorandum of agreement which it freely entered into. It would appear that the employer has won in this case, just as it would have had the tables been turned. If a majority of the employees in the two locals taken together had voted to ratify, while the result in one of the locals taken by itself was to reject the contract, the employer would have insisted that he had a collective agreement with both locals. He would have been correct, owing to the effect of Section 43(4) of the Act. The employer cannot have it both ways.
6. I would have answered the question from the Minister by holding that he has authority to appoint a conciliation officer as no agreement has been concluded with Local 419 or Local 141.

2093-78-R Retail, Wholesale, Bakery and Confectionery Workers' Union, Local 461, (Applicant), v. **General Bakeries Limited** (Mammy's Wonder Bread Division), (Respondent). v. Group of Employees, (Objectors).

Related Employer – Sale of a Business – One corporate entity carrying on business through two division – whether section 1(4) applicable – non-union business sold to union business – whether section 55 applicable

BEFORE: G. Gail Brent, Vice-Chairman and Board Members C. Ballentine and F. W. Murray.

APPEARANCES: *H. Buchanan and R. Woodruff for the applicant, D. I. Wakely, A. F. R. Fillion and Ross Kapasky for the respondents; David T. Povey for the objectors.*

DECISION OF THE BOARD; May 3, 1979

1. On consent, the application was amended at the hearing to include section 55 of the Act within it. The correct name of the respondent is General Bakeries Limited (Mammy's Wonder Bread Division).

2. The parties are agreed on all the essential facts. In May, 1978 the "bread division" of Christie Brown and Company Limited in the Province of Ontario was taken over by General Bakeries Limited. Included within the take over were all the bread baking and delivery operations of Christie Brown including the wholesale distribution routes.

3. Included within this takeover was the Christie Brown operation in the region of Cambridge. General Bakeries had, at all material times, and for some time prior thereto carried on operations in the region of Cambridge as Mammy's Wonder Bread. Prior to the take over these operations were carried on in separate depots. Immediately after the takeover General Bakeries created a new division known as Home Pride Bread, the former Christie Brown operation was conducted as Home Pride Bread and the former Christie Brown employees were hired as new employees, at least for some purposes, of General Bakeries.

4. The drivers of Mammy's Wonder Bread Division of General Bakeries in Cambridge are covered by a collective agreement between the applicant and the respondent. On or about December 9, 1978 the local supervision of the two divisions in Cambridge were amalgamated in one depot, the Home Pride Bread Depot.

5. In a letter dated February 19, 1979, Mr. E. Tally, Divisional Sales Manager of General Bakeries Limited, (Mammy's Wonder Bread Division) advised a General Bakeries Limited driver, Mr. Bruce Studiman, that his route would be deleted effective February 26, 1979 and that as of March 3, 1979 his employment would be terminated. On or about February 27th, approximately 60 per cent of Studiman's calls were transferred to Home Pride drivers. It is our understanding that a grievance has been filed in that matter and that the parties are proceeding to arbitration.

6. Section 1, subsection 4 reads as follows:

"Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate."

That subsection is designed to deal with situations where related business activities are carried out by, or through, more than one legal entity. Upon consideration of the authorities cited to us *Farquhar Construction Ltd.*, [1978] OLRB Rep. Oct. 914, *H. Allaire & Sons Ltd.*, [1974] OLRB Rep. July 457; *Inducon Construction of Canada Ltd.*, [1975] OLRB Rep. Apr. 399; etc. it would appear that the Board has consistently required the following:

- (1) there must be more than one corporation, firm, individual, association, or syndicate involved;

- (2) these entities must be under common control or direction; and
- (3) they must be engaged in associated or related business activities.

In the case before us we have only one legal entity, General Bakeries Limited. That corporation has divisions within it but none of the divisions relevant to the disposition of the matter before us has separate legal personality or entity apart from General Bakeries Limited. Therefore, the application under section 1(4) cannot succeed.

7. What took place in this situation was the sale of a part of the business of Christie Brown. The former employees of Christie Brown in Cambridge were not represented by a trade union at any material time. Had they been so represented then this would clearly be a case for the application of section 55 of the Act. That section applies whenever an "employer who is bound by or is a party to a collective agreement with a trade union ... sells his business" (section 55(2)). Notwithstanding the apparent broader wording of section 55(6) the Board has held in *Kerr-Progress Printing Ltd.* [1975] OLRB Rep. July 590, that where a unionized firm bought the business of a non-unionized firm and intermingled the employees, no vote would be held under section 55(6) because section 55 did not apply at all to this sort of situation. The intention of section 55 is to preserve existing bargaining rights of the trade union representing the employees of the vendor and where there are no such bargaining rights, as is the case here, then section 55 does not apply.

8. For all the reasons set out above the application is dismissed. It would also appear that the arbitration process already begun in this case is sufficient to deal with the situation concerning the interpretation of the collective agreement.

0200-79-M Labourers' International Union of North America, Local 183, (Applicant), v. Metropolitan Toronto Apartment Builders Association and Kerbel Developments Limited, (Respondents).

Arbitration – Construction Industry – Section 112a – Employer arguing portion of grievance untimely – whether waiver by failing to object to timeliness of entire grievance

BEFORE: R. A. Furness, Vice-Chairman, and Board Members C. Ballentine and J. D. Bell.

APPEARANCES: *Lou Castaldo for the applicant; R. M. Parry, Shirley Naster and Bill Proudfoot for the respondents.*

DECISION OF R. A. FURNESS, VICE-CHAIRMAN AND BOARD MEMBER C. BALLENTINE; May 15, 1979

1. The applicant has referred a grievance concerning the interpretation, application, administration or alleged violation of a collective agreement to the Board for final and binding arbitration.

2. The grievance related to the alleged failure of Kerbel Developments Limited and its subsidiaries to pay certain of its employees the correct hourly rate of pay retroactive to May 1, 1978.

3. The parties reached a settlement with respect to the monies to be paid to Arturo Barbosa, Jose Antonio and Joaquim Gomes and with respect to part of the monies which were alleged to be paid to Jose Barbosa. The amounts payable to these four persons are with respect to wages and vacation pay. The parties further agreed that the settlement should record that Kerbel Developments Limited has violated Schedule A, Article 2.2 of the collective agreement between the applicant and The Metropolitan Toronto Apartment Builders Association which was made on July 28, 1977.

4. The outstanding issue between the parties was whether Jose Barbosa was employed (for the purpose of this application) by Kerbel Developments Limited as a working foreman rather than as a labourer. Upon such a determination rested a claim for an extra fifty cents per hour in wages and additional vacation pay based upon this higher rate of wages. The Board heard evidence and representations with respect to the work performed by Jose Barbosa and ruled at the hearing that he was employed (for the purposes of this application) by Kerbel Developments Limited during the relevant period of time as a working foreman.

5. It was raised in argument by the respondents for the first time that the applicant had been guilty of delay and had not complied with the provisions of Article 4 of the collective agreement. We ruled that while we were concerned with the delay in pursuing this grievance, the respondents could not selectively waive time limits and settle a grievance with respect to the main part of the grievance and raise an issue of timeliness with respect to the issue of the entitlement of Jose Barbosa to his premium rate and not to his regular rate of pay. We ruled that the respondents had waived any issue with respect to timeliness.

6. We ruled at the hearing that Jose Barbosa was entitled to the differential of fifty cents per hour as wages together with vacation pay to be calculated on this differential. We directed the parties to meet and determine the additional amount owing to Jose Barbosa. The Board remains seized with this application and will determine this additional amount if the parties are unable to agree on the additional amount. Upon being informed of the additional amount or upon a determination by the Board of this additional amount, we shall incorporate such additional amount in our determination.

7. Having regard to the agreement of the parties, we made the following partial determination pursuant to section 112a of The Labour Relations Act.

- I Kerbel Developments Limited has violated Schedule A, Article 2.2 of the collective agreement between Labourers' International Union of North America, Local No. 183, and The Metropolitan Toronto Builders Association which was made on July 28, 1977.
- II Kerbel Developments Limited shall forthwith pay the sum of two hundred and seventeen dollars and eighty cents (\$217.80) to each of the following persons:

Jose Barbosa

Arturo Barbosa
Jose Antonio and
Joaquim Gomes.

DECISION OF BOARD MEMBER J. D. BELL:

1. I do not agree with the majority of the Board that the respondents have waived any issue with respect to timeliness. The applicant has been guilty of delay and has not complied with the provisions of Article 4 of the collective agreement.
 2. Therefore, I would dismiss the grievance of Jose Barbosa.
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0002-79-R Oil, Chemical & Atomic Workers International Union,
(Applicant), v. **Leco Industries Limited**, and Poly House Pkg. Limited,
(Respondents), v. Group of Employees, (Objectors).

Certification – Membership Evidence – Earlier application withdrawn after employer filed allegations of non-pay and intimidation – Board’s usual investigation into non-pay commenced but not completed – second application filed supported by fresh membership evidence – no allegation of impropriety with respect to fresh membership evidence – certification granted

BEFORE: R. O. MacDowell, Vice-Chairman and Board Members R. W. Redford and H. Simon

APPEARANCES: *B. Chercover and Dennis Nelson for the applicant; R. C. Filion, B. L. Fenoulhet and D. Hare for the respondents; Gerald Yasskin for the objectors.*

DECISION OF R.O. MACDOWELL, VICE CHAIRMAN AND BOARD MEMBER H. SIMON; May 11, 1979

1. This is an application for certification. The parties are in agreement that section 1(4) of The Labour Relations Act applies to the two corporate respondents and that, accordingly, they should be treated as a single employer for purposes of the Act.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of the Act.
3. Having regard to the representations of the parties the Board further finds that all employees of the respondents at their plants in Rexdale, Ontario, save and except foremen and shift supervisors, persons above the rank of foreman and shift supervisor, office and clerical staff, laboratory staff, sales staff, security guards and students employed during the school vacation period, constitute a unit of employees of the respondents appropriate for collective bargaining.
4. For purposes of clarity the Board notes that the term “laboratory staff” does not

include the plant technical employee(s) and that, accordingly, such employee(s) should be included in the bargaining unit.

5. In order to appreciate the respondents' position in this matter it is necessary to refer to an earlier application for certification, concerning the same employees (Board File No. 1987-78-R) which was dismissed by a decision of the Board dated March 30th, 1979. In that application (as in the present one) the applicant filed documentary evidence of membership in the trade union showing well in excess of the fifty-five per cent level of support necessary for certification without the taking of a representation vote. In that case, too, the membership evidence consisted of combination applications for membership and receipts bearing the name of the applicant, indicating a payment of one dollar, and signed and countersigned by the individual employee and another employee "collector." This form of documentary evidence is commonly used in applications for certification, and both complies with Rule 48 of the Rules of Practice and evidences membership in the union within the statutory definition of that term, found in section 1(1)(j) of the Act. In addition, the applicant filed a declaration in Form 8 over the signature of Dennis W. Nelson stating that, on the basis of his personal knowledge and the enquiries which he had made, the documentary evidence was accurate. The Board insists on the highest standards of integrity on the part of those who submit membership evidence because it cannot, as a practical matter, interview each person claimed as a member and so must rely, to a great extent, on evidence which is not available for examination by the employer, or any other party (see section 100 of the Act.) Where a trade union representative has failed to make the thorough enquiry contemplated by Form 8, the application for certification may be dismissed. On the other hand, the Board recognizes that a professional trade union representative has no access to the employee on company premises, or on company time, so that, as a practical matter, the solicitation of membership support for the union will be done by rank and file employees who are not thoroughly familiar with the Board's practice. This does not relieve the trade union of its obligation to carefully instruct such persons, but it does mean that on occasion, in spite of due diligence on the part of the trade union, there will be irregularities in the membership evidence. This is especially true where the bargaining unit is relatively large, as in the present case.

6. In the earlier application the respondent alleged, *inter alia*, that some eight employees for whom membership cards had been submitted had not, in fact, paid any money to the trade union in respect of initiation fees or monthly dues, as is required by section 1(1)(j)(ii). In its decision dated March 23rd, 1979 the Board dealt with these matters as follows:

4. An examination of the lists of employees filed on behalf of the employer indicates that there are some 137 or 138 employees in the bargaining unit. The trade union submitted documentary evidence of membership in proper form and in a timely fashion which indicates *ex facie* that some 92 employees in the bargaining unit support the trade union. Ordinarily this would be sufficient support to justify certification without a representation vote pursuant to section 7(2) of the Act. However, the respondents have made certain allegations of intimidation and coercion in the solicitation of these membership cards. There are also allegations that certain employees for whom the trade union submitted membership documents indicating a payment of the sum of \$1.00 on

account of initiation fees, have not, in fact, made any payment to the union. The Board's usual investigation of these latter charges was not completed by the date of the hearing, but it was apparent that a formal hearing would be required to consider them. In the circumstances, the Board considered it appropriate not to hear the respondents' allegations of intimidation at this time, but rather to defer such consideration to a later date when all of the allegations of misconduct could be heard and resolved together. Having regard to the scheduled commitments of this particular panel of the Board we were concerned that if we began to entertain evidence and thus became seized of these contentious issues the matter could not be resolved as expeditiously as might be the case if we deferred all of the disputed issues to another day and another panel of the Board. Neither of the parties opposed an adjournment on this basis and, accordingly, the Board decided to adjourn without hearing evidence at this time.

The Board, therefore, heard no evidence concerning the alleged improprieties in the solicitation of membership evidence. However, it was apparent that, regardless of the substance of the respondents' claim, a further hearing (or hearings) would be required to resolve these outstanding issues. This would necessarily have involved some weeks' delay.

7. By letter dated March 30th, 1979 the applicant sought leave to withdraw its application. The text of that letter is as follows:

"Re: Oil, Chemical & Atomic Workers International Union and Leco Industries Limited and Poly House Packaging Limited – Board file 1987-78-R

This letter is in relation to the above application made on March 2, 1979 and subsequent questions of "non-pay" that were raised at the Board hearing of March 19, 1979.

Following the hearing, a thorough investigation was conducted by the Oil, Chemical & Atomic Workers International Union to determine if any errors had "occurred during the campaign."

All of the cards were signed by "in plant" organizers who were briefed on the proper procedures of signing employees and of the \$1.00 payment required with each card. Our investigation revealed that there were instances where certain employees were requested by other Company employees to indicate to Board officers that they *did not* pay the \$1.00.

The investigation also verified the payment of \$1.00 on the cards but there was some question on certain cards as to who was the actual "collector". This happened because of the number of people who were present when certain cards were signed. We feel that the errors were of a technical nature and occurred because of the inexperience of the "in plant" organizers as well as certain misunderstandings because of communication difficulties due to language.

We also wish to state that full payment was received and retained by the Union on all cards and that when Form 8 was signed, it was done so with the understanding that the \$1.00 had been paid directly to the "collector".

In carefully reviewing the overall situation and recognizing the time delays that may be incurred, the union is requesting permission to withdraw the application without any bar being imposed."

It will be observed that there is no admission of any impropriety and, as has already been pointed out, there was no *evidence* before the Board, at that time, of fraud or other misconduct. By a decision dated March 30th, 1979 the Board did not accede to the request for withdrawal, but rather dismissed the application. The Board did not impose a bar to a subsequent application, as it is entitled to do pursuant to section 92(2)(i) of the Act. The Board has never looked on the power to impose a bar as being of a punitive nature, and the Board will not generally impose a bar where leave to withdraw has been requested upon the discovery of defective membership evidence. Even if the original application for certification had been proceeded with, and the "non-pay" allegations had been substantiated, the effect would have been merely a dismissal of the application. There was no indication of the exceptional circumstances which would have to be present before the Board would impose a bar.

8. On April 2nd, 1979 the applicant filed a *new* certification application, together with *new* membership evidence in support thereof. In order to avoid the problems which arose in its earlier application, the applicant apparently "resigned" all of its original supporters and collected a new \$1.00 payment. Again, a Form 8 declaration was submitted over the signature of Dennis W. Nelson. Counsel for the respondents candidly acknowledged that, in the circumstances, the new membership evidence was probably unimpeachable and he had no allegations to make with respect thereto. The Board notes that this new documentary evidence of membership is satisfactory in all respects and again indicates that well in excess of fifty-five per cent of the employees in the agreed bargaining unit support the applicant. Nevertheless, the respondents contend that the Board should either dismiss the application, impose a bar to the present application (which presumably would involve a reconsideration of the original application in which no bar was imposed) or, in the alternative, exercise its discretion to order a representation vote – a discretion which the Board has even though the union has demonstrated sufficient support for certification without a representation vote. The respondents contend that since, in the previous application there might have been evidence to sustain their allegations of evidentiary irregularities, or there might have been evidence from which the Board might infer fraud or negligence on the part of the trade union representative, there is a "cloud" over the applicant's present application, and the Board should seek the confirmatory evidence of a representation vote before issuing a certificate.

9. The argument made by the respondents in the present case is virtually identical to that considered, and rejected, by the Board in the very recent decision in the *Ontario Hospital Association* (Board File No. 1772-78-R), decision dated March 14th, 1979 – as yet unreported. There, too, the respondent argued that, because of certain allegations which had been made in a previous application, the Board should exercise its discretion to order a representation vote in a subsequent application. At paragraphs 9 and 10 of the *Ontario Hospital Association* decision the Board summarized the argument as follows:

9. The respondent argued that the Board relies upon Form 8, Declaration Concerning Membership Documents, and the evidence of membership filed by the applicant. The respondent stressed that Form 8 is to be completed on the basis of knowledge (including inquiries), information and belief and argued that Form 8 had been signed negligently and erroneously. On this basis the Form 8 filed in File No. 0718-78-R was characterized as inaccurate, false and misleading. In these circumstances, the respondent argued that there is a cloud on the evidence in the instant application (even if new evidence of membership has been filed) which may only be dissipated by a representation vote in the instant application.

10. The central question to be considered by the Board is whether the conduct of the applicant with respect to evidence of membership in one application may cause the Board to seek the confirmatory evidence of a representation vote in a subsequent application for certification which involved the same employer, the same trade union and, to all intents and purposes, the same bargaining unit.

10. In view of this very recent Board decision, which contains a review of the authorities, it is unnecessary for the Board to repeat that review in the present case. Suffice to say that the Board adopts the reasoning and analysis of the panel in the *Ontario Hospital Association* case, as well as its conclusion that no representation vote should be ordered in these circumstances. Whether or not the Board can resort to evidence given before it at previous certification hearings when the panel was differently constituted (in this regard see *R. v. OLRB, ex parte Trenton Construction Workers Assoc.*, [1963] 2 O.R. 376 and, more recently, *Radio Shack*, [1978] OLRB Rep. Nov. 1043) we are not persuaded that the allegations in the present application are of such kind or character as to prompt the exercise of our discretion to impose a bar or order a representation vote. There is no allegation before the Board in the present case with respect to any impropriety in the evidence presently before us. Nor, as we have already pointed out, is there any *evidence* of irregularity or misconduct in the previous application. In the circumstances, therefore, the Board is satisfied, on the basis of all the evidence before it, that more than fifty-five per cent of the employees of the respondents in the bargaining unit, at the time the application was made, were members of the applicant on 9th April, 1979, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

11. There was filed with the Board a statement in opposition to the certification of the applicant as contemplated by Rule 48 of the Rules of Practice. However, there was very little overlap between the signatures on that statement of desire and the names of the trade union supporters who had signed membership cards. In the circumstances it was unnecessary to pursue the inquiry contemplated by Rule 48 since, even if the statement of desire was entirely voluntary, it is not numerically relevant. That is, it would not prompt the Board to exercise its discretion under section 7(2) of the Act to order a representation vote. Regardless of the effect of this statement of desire, the trade union continues to enjoy the support of well over 55% of the employees in the bargaining unit, which the Board has found to be appropriate.

12. Mr. Yasskin appeared on behalf of certain (unnamed) objecting employees who had recently retained him. He indicated that in his conversations with his clients statements had been made which suggested that some *other* employees *might* have been coerced into joining the trade union. However, Mr. Yasskin characterized these statements as “third-hand”, or rumours, which did not involve his clients directly and which he had not had the opportunity to investigate. He was not prepared to give any particulars of misconduct as contemplated by Rule 47 and, in the circumstances, could not submit to the Board that there had, in fact, been any misconduct. No employee has complained of being intimidated or coerced. In the circumstances, the charges appeared entirely speculative and the Board decided not to adjourn merely because of a possibility that the “third-hand hearsay” might be converted into something more substantial. Mr. Yasskin was unable to assist the Board further and withdrew, following the ruling that the Board would proceed.

13. A certificate will issue to the applicant.

DECISION OF BOARD MEMBER R. W. REDFORD:

1. I have had the opportunity of reading the decision of the majority and regret that I cannot concur therein. In certification applications the Board is required to rely almost exclusively upon documentary evidence of membership. The combined effect of section 100 of the Act, and Rule 48 of the Rules of Practice, makes it impossible for any interested party to cross-examine, upon this evidence, to determine whether it accurately reflects the true wishes of the employees whose support it purports to show. In the circumstances, it is of the utmost importance that there be no question whatsoever concerning the manner in which support for the union was solicited and the accuracy of the union's membership evidence. In the earlier case, the union filed certain membership documents, together with a statutory declaration from the trade union representative vouching for their accuracy; yet, when questions were raised concerning whether certain employees had, in fact, made the required contribution, the application was hastily withdrawn. Now we have a second application, with new membership evidence, and a new statutory declaration, in exactly the same terms, as the previous one. In my view the hasty withdrawal of the earlier application suggests that there were, in fact, irregularities, notwithstanding the statutory declaration to the contrary. It would appear that given the timing of the withdrawal of the first application March 30, 1979, and the submission of the second April 2, 1979, that organizing the second was in progress well before the first was withdrawn. In addition, the existence of a petition in the instant case and the attempt by a group of employees to postpone the second hearing, to investigate allegations of coercion, surely suggest at best a clouded application and the possibility of significant irregularities.

2. It should also be noted that there are substantial differences between the instant case and that of the Ontario Hospital Association (1772-78-R) which was relied upon heavily in the decision of the majority. The time span between the first application and the second in the OHA case was from July 17/78 to January 29/79 – a six-month interval. In the instant case, the second application was filed on the heels of the first. So quickly was the second filed that the allegations made as a result of the first had not been investigated by the Board when the switch to the second occurred. The second difference is that the allegations made in the first application in the OHA case were made about persons who were involved in the second application. In fact, a completely different vehicle was used in the second campaign. The circumstances of the instant case are quite different. The same group who

organized the first application were also involved in the continued organizing which led to the second application. The third difference is that no allegations of improper or irregular conduct were made in the OHA case. In the instant case, an allegation was inferred by counsel for a group of employees which due to time constraints had not been fully investigated and was, therefore, disallowed by the Board.

3. In exercising discretion under Section 7(2) of the Act, the Board's purpose should be to clear away those things which have produced some doubts about the conduct of one or both parties during the course of an organizing drive. Here we have a situation where allegations were made during a first application, before the full investigation could take place the application was withdrawn; a second application follows immediately after the withdrawal of the first, the second application hearing is clouded by allegations, unsupported because counsel for a group of employees had not had time to investigate them, and the second application is accompanied by a petition. Finally, the circumstances of the case used to support the majority decision in my view were significantly different from those of the instant case. For these reasons, I would have exercised the discretion of the Board to order a representative vote in spite of the apparent membership support in excess of 55%.

1871-78-U Office and Professional Employees International Union, Local 343, (Complainant), v. Labourers' International Union of North America, Local 1089, (Respondent).

Discharge for Union Activity – Laid-off for lack of work – grievor never joining trade union – no evidence of union activity

BEFORE: E. Norris Davis, Vice-Chairman, and Board Members C. G. Bourne and M. J. Fenwick.

APPEARANCES: *Kathy Maddison, Janice Best, Deanna Bacon and June Lasenby for the applicant; S. B. D. Wahl and R. D'Andrea for the respondent.*

DECISION OF THE BOARD; May 24, 1979

1. This is a complaint under section 79 of The Labour Relations Act alleging contraventions of sections 56, 58 and 61 of the Act.

2. The respondent local centres its activities in the Sarnia area and its level of activity is directly related to construction activity in the area. The local has a normal membership of some 800 and experienced a peak enrollment of approximately 2000 in the period 1974-77 which began tapering off in early 1978 due to completion of construction projects. As of the time of the hearing, the local had a membership of something over 1000, of which 600 were on the unemployed list. Testimony also established that there are no new projects envisaged which will change this picture in 1979.

3. In order to fulfill its functions the local maintains a small office staff which ad-

ministers the "out of work" list including referrals to employment, pension, welfare and vacation pay, trust accounts, union dues payments and grievance administration. The staff consists of Mr. D'Andrea, Business Manager with two assistant Business Managers who are responsible for the field work and who assist in some of the office work if available. Prior to the discharge of the grievor, Deanna Bacon, there were also three persons engaged in clerical work, Bacon, Jeanette Moore and Gina D'Andrea.

4. On January 26, 1976 the Business Manager, D'Andrea, while in Toronto on business, phoned back to his office and spoke to one of his assistants, Orfeo Iacovelli and instructed him to advise Bacon she was being laid off for lack of work. Iacovelli testified that he carried out those instructions. Bacon testified that she asked the reason for the lay off and that Iacovelli replied, "Rocky called, and it was Rocky's orders".

5. D'Andrea testified that he made the decision to cut back staff and he had decided that he preferred to keep his daughter, Gina, working and therefore the person affected by the decision was Bacon.

6. Jeanette DiRezzi (né Moore) has been employed by the local since September 1976 as an Accounting Clerk responsible for the welfare, pension and vacation pay trust funds and also assists in general office work as required. DiRezzi testified that since January 26, 1979 when Bacon was laid off, she and the other remaining clerical worker, Gina D'Andrea have been able to cope satisfactorily with the work-load and that, in her opinion, there is not now sufficient work for another person. Gina D'Andrea's testimony was to the same effect.

7. The Board has no hesitancy in finding, as a fact, that there had been a decline in work-load which clearly justified a reduction in staff. It is the contention of the grievor, Bacon, that she was selected for such reduction because of her interest in organizing the staff into the Office and Professional Workers Union.

8. The evidence relating to the involvement of the Office and Professional Workers with this group of employees falls short of establishing any overt act by that union to organize. Janice Best, a member of that Union's Executive Board and Organizing Chairman stated that the Executive Board did approve, in November, 1978 a request by Miss Maddison, an organizer, to organize this group. Best, herself, stated she had never spoken to any of this group of employees: Jeanette DiRezzi and Gail D'Andrea the remaining employees other than Bacon state they were unaware of any efforts by any trade union to organize the office staff. Bacon states that she did write a letter on December 18, 1978 to the Toronto office of the Office and Professional Workers Union expressing interest and asking for information, and that she had never received a reply to that letter. The Office and Professional Workers stipulated that they had never received that letter, but did receive a photocopy of it on February 6, 1979: Bacon states that she had made photocopies but has no knowledge of how one came to be mailed to the Office and Professional Workers. Bacon also testified that she had never signed a card in the Office and Professional Workers Union, and that her first personal contact with that union was in March 1979.

9. On the evidence, the Board finds as a fact that at the time of Bacon's lay off on January 26, 1979 there was no active campaign by the complainant to organize the office staff of Local 1089.

10. Bacon testified that Business Agent, D'Andrea, was well aware of her interest in unions in general and that since 1977 she would discuss unions with him on an average of twice per week. Bacon recounted one discussion in which she told D'Andrea she might join the Labourers' union and his response "are you kidding?": Bacon protested that she was serious and D'Andrea is said to have replied "you're nuts". Bacon also testified that she acquired a copy of a Office and Professional Workers' contract covering the staff of another union located in the same building as Local 1089. This copy was acquired in October 1978 at a time when one of those employees was using Local 1089's photocopying equipment to make copies of the contract, and was followed by discussions with that employee on several occasions. Bacon testified that sometime in November 1978 she saw a copy of this same contract on D'Andrea's desk at a time when she was straightening up his desk. D'Andrea, who was present, according to Bacon asked "where I had got it" and there was some general discussion in the course of which Bacon says she made a little joke that the girl in the other union office made so much money because she belonged to the union and that D'Andrea didn't "think it too funny". D'Andrea denied that entire incident had occurred and that he had never at any time discussed that contract with Bacon. The Board prefers D'Andrea's evidence in this regard.

11. The Board noted that it declined to hear testimony from Mrs. June Lasenby, President of the Citizens Action Committee of Sarnia, relating to some investigation made by that organization into these events. The Board was of the view that such testimony would involve hearsay and conclusions based on such hearsay.

12. The question before the Board is whether the discharge of Bacon was in any way motivated by her interest in joining a trade union. We accept the fact that there were many discussions between Bacon and D'Andrea over at least a two year period about trade unionism and the benefits of being a member. We would be surprised, given the nature of the respondent's activities, if it had been otherwise. There is no evidence from which it can be inferred that the respondent had any knowledge that these general discussions had matured into a specific intention on the part of Bacon to exercise her rights under the Act to become a member of any union. Indeed, the Board would have difficulty in concluding that Bacon had formed that specific intention prior to January 26, 1979 in view of the circumstances surrounding the letter dated December 18, 1979 which was never received by the complainant (but copy of which did reach the complainant on February 6, 1979 in some unexplained fashion), the non-contact of Bacon with the complainant until March 1979 and the lack of presence of any campaign in respect to the other employees.

13. The Board is satisfied with the respondent's explanation of the reason for the discharge and that it was for reasons that did not contravene any section of the Act.

14. The complaint is dismissed.

0050-79-M Ottawa-Carleton Regional Health Unit, (Employer), v. The Civic Institute of Professional Personnel of Ottawa-Carleton, (Trade Union).

Collective Agreement – Conciliation – Reference – Minister appointing conciliation officer – Union objecting to appointment – Whether Minister exhausting authority under section 15 – whether Board has jurisdiction to advise Minister – Anti-Inflation Board ordering rollback – whether collective agreement voided – effect of section 48 of Anti-Inflation Act

BEFORE: Donald D. Carter, Chairman, and Board Members O. Hodges and E. C. Went.

APPEARANCES: *Michael Gordon and Timothy W. Sargeant for the employer; Chris G. Palliare and Janet Chéné for the trade union.*

DECISION OF THE BOARD; May 23, 1979

1. This is a reference to the Board under section 96 of *The Labour Relations Act* following a request by the employer to appoint a conciliation officer. The Minister has referred to the Board the question of whether he has the authority to appoint the conciliation officer requested by the employer.

2. At the outset of the hearing, counsel for the employer took the position that, since a conciliation officer had already been appointed by the Minister, the Board had no jurisdiction to report to the Minister its decisions on the question. According to counsel, section 96 only contemplated a situation where the Minister had not yet appointed a conciliation officer, and to interpret section 96 as giving the Board a jurisdiction to decide the question after the appointment had already been made would be to give the Board a jurisdiction to review the Minister's decision. This submission appeared to be premised upon the second argument made by counsel for the employer – that the power to appoint under section 15 did not allow the Minister to reconsider any appointment once made. Counsel argued that, since the Minister's power to appoint under section 15 had been exhausted, the Board no longer had any jurisdiction to exercise its function under section 96.

3. This preliminary objection requires an examination of some of the background behind this reference. An application for conciliation was made by the employer on March 12, 1979, and, according to the certificate of service, a copy of the application was sent to the union on that same day. Receipt of the application was acknowledged by the Ministry of Labour in a letter, dated March 13, 1979. That letter indicated that the application would be processed after an interval of five calendar days from the date shown on the certificate of service if no objections were received from the other party. In a letter dated March 19, 1979, counsel for the union wrote to the Ministry of Labour stating its position that the Minister, in the circumstances, should appoint an interest arbitrator, and that little purpose would be served by appointing a conciliation officer. Counsel for the employer replied in a letter of March 26th to the Ministry, setting out his submission that the Minister only had jurisdiction to appoint a conciliation officer. The parties were advised, in a letter dated March 27, 1979, from the office of the Deputy Minister, that the Minister of Labour had appointed F.D. Kean as their conciliation officer. On April 12, 1979, however, counsel for the union wrote to the Deputy Minister of Labour making further representations on the letter of March 26th from counsel for the employer, arguing that the Minister had no jurisdiction to appoint a conciliation officer and asking that the appointment of the officer be revoked. The

question of whether the Minister had the authority to appoint the conciliation officer was referred to the Board on April 14, 1979.

4. The preliminary question is whether the Board has jurisdiction to respond to this referral. Reference must be made to both section 96 and section 15 of the Act:

96. – (1) Where a request is made under section 15 or subsection 4 of section 37, the Minister may refer to the Board any question that arises that in his opinion relates to his authority to make an appointment under any such provision that is mentioned in the reference, and the Board shall report to the Minister its decision on the question.

(2) Where a question referred under subsection 1 involves an issue as to whether one trade union is the successor of another trade union or whether a business has been sold by one employer to another or where such question involves an issue under subsection 11 of section 55, the Board has the same powers and authority as it has under section 54 or 55, as the case may be, as if an application had been made thereunder, and the Board may issue such directions as to the conduct of the proceedings as it considers advisable.

15. – (1) Where notice has been given under section 13 or 45, the Minister, upon the request of either party, shall appoint a conciliation officer to confer with the parties and endeavour to effect a collective agreement.

(2) Notwithstanding the failure of a trade union to give notice under section 13 or the failure of either party to give written notice under sections 45 and 111, where the parties have met and bargained, the Minister, upon the request of either party, may appoint a conciliation officer to confer with the parties and endeavour to effect a collective agreement.

(3) Where an employer and a trade union agree that the employer recognizes the trade union as the exclusive bargaining agent of the employees in a defined bargaining unit and the agreement is in writing signed by the parties, the Minister may, upon the request of either party, appoint a conciliation officer to confer with the parties and endeavour to effect a collective agreement.

(4) Notwithstanding anything in this Act, where the Minister has appointed a conciliation officer or a mediator and the parties have failed to enter into a collective agreement within fifteen months from the date of such appointment, the Minister may, upon the joint request of the parties, again appoint a conciliation officer to confer with the parties and endeavour to effect a collective agreement, and, upon such appointment being made, sections 16 to 33 and 63 to 70 apply, but such appointment is not a bar to an application for certification or for a declaration that the trade union no longer represents the employees in the bargaining unit.

5. The nature of the Board's jurisdiction under section 96 was considered by the Ontario Court of Appeal in *R. v. Ontario Labour Relations Board, Ex parte Kitchener Food Market Ltd.*, [1966] 2 O.R. 513 (Ont. C.A.). The following portion of the Court's reasons in that case appear to be particularly helpful:

"Section 79a [now s. 96] must be taken in context. It is appendant to an invocation of the Minister's exclusive authority to appoint a conciliation officer. Once invoked by a request under s. 13 [now s. 15] that authority must be exercised (subject only to the postponement pending the conclusion of a reference made by the Minister) or the Minister must take the risk that mandatory relief may be sought against him if he refuses to act. Equally, challenging action may follow the appointment of a conciliation officer. These considerations point up the Board's purely advisory role; the Minister in acting upon the Board's determination makes it his own; and correlatively, if he disregards it there is no recourse save in respect of the action taken by the Minister. Putting the matter another way, the Board's "decision" is peripheral to the process in which the parties are involved, namely that of compulsory conciliation. Any action, or inaction that falls to be impugned is that of the Minister only; the Board's decision has no independent effect.

I do not relish disposition of this case on what appears to be a procedural point, especially when it has been fully argued on the merits. More than procedure is, however, involved. The point of procedure merely reflects the substantive statutory right of the Minister to seek and receive expert advice as a possible guide to discharge of his statutory duties, untrammelled by intermediate interference. Although the advisory character of a reference under s. 79a might have been more clearly phrased, the considerations that have been canvassed justify the giving of such an imprint to that provision."

6. These comments make it clear that the function exercised by the Board under section 96 is advisory only, leaving the Minister free to either accept or reject the Board's opinion once the Board has reported its decision on the questions. It is equally clear that this function is ancillary to the functions exercised by the Minister under section 15, i.e., the appointment of the conciliation officer. As the Court of Appeal pointed out, the procedure established by section 96 gives the Minister "the right to seek and receive expert advice as a possible guide to discharge of his statutory duties". It would appear to follow, therefore, that if the statutory duty imposed upon the Minister has been discharged, the procedure under section 96 would no longer be applicable. Otherwise, the Board would be in a position of advising the Minister in a situation where that advice could no longer be acted upon.

7. In this case, therefore, it is necessary to determine whether the Minister has exhausted his authority to appoint a conciliation officer under section 15 of the Act. Counsel for the employer cited *Martin v. County of Brant*, [1970] 1 O.R. 1 (Ont.C.A.) and *R. v. Minister of Finance*, [1935] S.C.R. 60, in support of his argument that the Minister's authority under section 15 had been completely exercised. Neither of these decisions, however, appears particularly persuasive as it relates to the facts before us. In the *Martin* case, it was

held that, given the existence of a statutory right of appeal to the Courts, the Ontario Municipal Board had no authority to reconsider certain types of decisions. The decisions in question, however, were clearly of a quasi-judicial nature, and it appears that the Court of Appeal was merely stating that this type of decision should have some finality, especially in light of the express statutory right of appeal to the Courts. No greater assistance is provided by *R. v. Minister of Finance, supra*, as that case merely appears to stand for the proposition that a Minister cannot reconsider an earlier decision already disposed of by the Lieutenant-Governor in Council on appeal.

8. In contrast to those two cases, what we have before us is a wide administrative power, to be exercised by the Minister exclusively. While it is obvious that the Minister must appoint a conciliation officer, once the pre-conditions set out in that section are met, there is no restriction upon the manner in which such an appointment is made. The power being exercised by the Minister is a statutory power to appoint, and the scope of that power must be defined with regard to the provisions of *The Interpretation Act*, R.S.O. 1970, c. 225. Section 27(1) of that statute provides that, in the absence of a contrary intention, "words authorizing the appointment of public officer or functionary, or a deputy, include the power of removing him, or appointing another in his stead or to act in his stead, from time to time in the discretion of the authority in whom the power of appointment is vested". Section 15 of *The Labour Relations Act*, therefore, must be read as not only giving the Minister the power to make an appointment but also the power to revoke that appointment.

9. The facts in this case would indicate that this conclusion makes good sense. It would appear that only after the conciliation officer was named did Ministry officials realize that there existed a substantial dispute between the parties concerning the Minister's authority to appoint that officer. At that point a reference was made by the Ministry to the Board under section 96 in order to seek the Board's advice on that issue. The conciliation officer has not yet met with the parties, and the matter appears to have been in abeyance until the Board reports its decision to the Minister. In these circumstances, it would not make good industrial relations sense to consider that the Minister has no power to revoke the appointment of the conciliation officer if he should have second thoughts about his authority to make such an appointment. There does not appear to have been any particular reliance on the Minister's action by either of the parties. A ministerial reconsideration, moreover, does not interfere in any way with whatever right the parties might have to seek judicial review of the Minister's decision. As a result, it is difficult to see any prejudice that might result to the parties if the Minister were to reconsider his decision.

10. The Board concludes that the Minister has the authority to reconsider and, if he considers it appropriate, to revoke his decision to appoint the conciliation officer. Given that the Minister has not exhausted his authority under section 15, the Board still has jurisdiction under section 96 to provide the Minister with advice as a guide to the discharge of that authority. For these reasons the preliminary objection is dismissed.

11. We turn now to the question of whether the Minister has authority to appoint the conciliation officer in the circumstances of this case. At the hearing the parties were able to agree on the following statement of facts:

- (1) A collective agreement dated the 1st day of January, 1976 and expiring the 31st day of December, 1976 reached on the basis of an

arbitral award of Professor Kruger sitting as sole arbitrator, expired. Notice to bargain was given in respect of the expiration of that agreement on October 28, 1976.

- (2) Following a series of meetings between the parties the question of the terms of a new collective agreement was referred by the Institute to arbitration on September 14, 1977.
- (3) The Employer challenged the Minister's authority to appoint an arbitrator in respect of the interest dispute between the parties on October 11, 1977.
- (4) The Ontario Labour Relations Board convened a hearing with respect to the question of the Minister's jurisdiction to appoint an arbitrator under the provisions of The Labour Relations Act, Ontario, late in the year 1977.
- (5) The Ontario Labour Relations Board advised the Minister that she had no jurisdiction to appoint an arbitrator pursuant to the statute but, upon the agreement of the parties, expressed an opinion that the Minister did have jurisdiction to appoint the arbitrator pursuant to the terms of the collective agreement. This advisory opinion was issued on the 23rd day of February, 1978.
- (6) An interest arbitration hearing was held before George Adams (sole arbitrator) on Saturday, the 2nd day of September, 1978.
- (7) The award of the sole arbitrator was released to the parties on the 11th day of October, 1978.
- (8) On October 17, 1978 the Employer, acting pursuant to the terms of the Adams' award (duration clause) issued a notice to bargain to The Civic Institute of Professional Personnel with respect to the terms and conditions of a collective agreement for the year 1979.
- (9) On October 31, 1978 the Employer put forward a draft form of contract drawn up pursuant to the terms of the Adams' award and submitted it to The Civic Institute of Professional Personnel.
- (10) Representatives of the Employer and The Civil Institute of Professional Personnel met for the purposes of discussing the implementation of the Adams' award. At that time the Employer took the position that it could not implement the terms of the Adams' award in total because, on its face, the award exceeded the guidelines established by the Anti-Inflation Board, Canada. The Employer advised the Institute of all of the calculations which it had made with respect to Anti-Inflation Board guidelines at that time and the Institute representatives took the position that it would probably appeal any roll-back which might be ordered by the

A.I.B. These initial meetings took place during the month of November, 1978.

- (11) No meetings were held between the parties with respect to the notice to bargain which had been given for the year 1979.
- (12) On December 7, 1978 the Anti-Inflation Board, Canada, rolled back the award of Arbitrator George Adams.
- (13) Subsequently, and following the receipt of advice from the Anti-Inflation Board, there were several meetings between the parties for the purpose of discussing the A.I.B. decision during the period between December 7, 1978 and January 30, 1979.
- (14) On January 30, 1979 the Employer formally took the position that there was no collective agreement between it and the Institute by reason of the A.I.B. roll-back and indicated its willing to negotiate the terms of a new collective agreement to replace the Adams' award. It also advised the Anti-Inflation Board, Canada, on the 31st day of January, 1979 that it could not file a compliance report in accordance with its instructions.
- (15) [On February 16, 1979] the Employer, having already implemented an interim wage scale for the years 1977 and 1978 within A.I.B. guidelines, but below the ceiling amount which the A.I.B. suggested was permissible, continued the 1978 wage scale for the year 1979 on consent of the Institute on an interim basis, without prejudice.
- (16) On March 12, 1979 the Employer, through its Counsel, applied to the Minister of Labour for the appointment of a Conciliation Officer.
- (17) On March 13, 1979 the Minister acknowledged receipt of the Employer's application for conciliation and advised that if no objection was received within a five day period the application would be processed.
- (18) On March 19, 1979 the Institute, through its Counsel, replied to the Employer's application for conciliation.
- (19) On March 20, 1979 the Deputy Minister of Labour forwarded a copy of the letter of March 19, 1979 from the Institute Counsel to the Counsel for the Health Unit.
- (20) On March 26, 1979 the Employer, through its Counsel, caused a reply to be hand delivered to the Deputy Minister in respect of the Institute's submission of March 19, 1979.

- (21) On March 27, 1979 the Minister of Labour appointed F. D. Kean as a Conciliation Officer in this matter.
- (22) On April 2, 1979 Counsel for the Institute, for the first time, took the position that the Minister had no jurisdiction to appoint a Conciliation Officer.
- (23) On April 9, 1979 the Employer Counsel took the position that the Conciliation Officer having been appointed, he was required to convene a meeting of the parties and that the Minister could not now repudiate the appointment.
- (24) On April 10, 1979 a purported reference under the provisions of section 96 of the statute was made to the Board by the Minister as to his authority to appoint a Conciliation Officer.
- (25) On April 17, 1979 the Employer, through its Counsel, took the position that the Minister having appointed a Conciliation Officer could not now seek the Board's opinion that subject and corrected the mistakes made on the face of the reference.
- (26) On April 18, 1979 the Institute, through its Counsel, agreed to the corrections made on the face of the reference by Counsel for the Employer and reiterated the Institute's position that the Minister has no jurisdiction to make an appointment.

12. Counsel for the employer took the position that the roll-back of the arbitration award by the Anti-Inflation Board rendered that award void from the point of roll-back forward, placing the parties in the position of having to renegotiate a new agreement to replace that award. In this situation, counsel submitted, the employer was entitled to apply for conciliation and, ultimately, to resort to economic sanctions if no agreement were reached. In support of this position counsel cited, among others, two leading decisions of this Board: *Croven Ltd.*, [1977] OLRB Rep. Mar. 162; *Libby, McNeill & Libby of Canada Ltd.*, [1977] OLRB Rep. Apr. 204. Counsel argued that these decisions had not been overruled by any subsequent judicial decisions. In counsel's view, notwithstanding the decision of the Divisional Court in *Re Libby, McNeill & Libby of Canada Ltd. and United Automobile, Aerospace & Agricultural Implement Workers of America*, [1979] 21 O.R. (2d) 340, and the decision of R.E. Holland, J., in *Edmonds v. Perth County Board of Education*, [1979] 21 O.R. (2d) 510, the Court of Appeal had left open the issue of the effect of a roll-back upon a collective agreement when dealing with the appeal in *Libby, McNeill*, [1979] 21 O.R. (2d) 362.

13. Fortunately, we need not re-enter this difficult area. At the point at which the roll-back occurred in this case, the *Anti-Inflation Act* had been amended by S.C. 1977-78, c. 26, s. 6 (effective April 20, 1978) to provide as follows:

Sec. 48. Idem. — (1) Notwithstanding the expiration of this Act, where the Anti-Inflation Board has made a recommendation with respect to any provision of a compensation plan, the plan shall be deemed to have been amended,

(a) where no reference of the matter to the Administrator for consideration by him has been made under any provision of the Act within the time provided for such reference, in accordance with the recommendation of the Anti-Inflation Board; and

(b) where a reference of the matter to the Administrator for consideration by him has been made within the time provided therefor, in accordance with any order of the Administrator in relation thereto that has not been rescinded or vacated, as varied pursuant to section 22 or by virtue of an appeal against the order.

(2) Compensation plan. – For the purposes of this section, “compensation plan” means the provisions, however established, for the determination and administration of compensation of an employee or employees, and includes a collective agreement, provisions established bilaterally between an employer and an employee or employees, provisions established unilaterally by an employer, or provisions established in accordance with or pursuant to any Act or law.

14. By force of these provisions a roll-back by the Anti-Inflation Board now has the effect of amending a compensation plan. The effect is somewhat the same as where the parties in their collective agreement have thereunder provided a procedure for the implementation of a roll-back. In this type of a situation, despite the roll-back, the Board has held that the collective agreement continues, being amended according to the procedure agreed upon by the parties. See *Ferranti-Packard Ltd.*, [1977] OLRB Rep. Mar. 196. Now the *Anti-Inflation Act* itself provides a clear procedure for the implementation of the roll-back stipulating that the compensation plan be amended accordingly. In the Board’s view, the term “compensation plan” is sufficiently broad to cover the arrangement between these two parties. The arbitration award already contained provisions for the “determination and administration” of compensation of employees, and must be considered to be a compensation plan as that term is understood in the *Anti-Inflation Act*.

15. The effect of the roll-back was not to void the arbitration award, as argued by counsel for the employer, but simply to amend that award so that it reflected the determination of the Anti-Inflation Board. The arbitration award as amended survived the roll-back, and neither party is entitled to renegotiate that award. Accordingly, neither party is entitled to give notice to bargain under section 45 of the *Labour Relations Act*, and the Minister does not have authority to appoint a conciliation officer.

16. The Minister, therefore, is advised that in the circumstances of this case he does not have authority to appoint a conciliation officer.

1509-78-R Labourers' International Union of North America, Local 183, (Applicant), v. **Pachino Construction Company Ltd.** (Respondent), v. Group of Employees, (Objectors).

Representation Vote – Ballot not marked correctly – “X” marked close to “NO” – whether spoiled ballot

BEFORE: R. A. Furness, Vice-Chairman, and Board Members C. Ballentine and C. G. Bourne.

APPEARANCES: *B. Fishbein, M. Papperny, T. Connolly and F. Palozollo for the applicant; Don Robinson, Q.C., for the respondent; and Hart M. Rossman for the objectors.*

DECISION OF THE BOARD; May 28, 1979

1. Pursuant to a decision of this Board dated February 23, 1979, a representation vote was conducted on March 15, 1979. Twenty persons cast ballots in the representation vote. At the conclusion of the representation vote the Returning Officer counted ten votes in favour of the applicant and ten votes against the applicant.

2. In a letter dated March 19, 1979, the applicant requested a hearing before the Board and stated:

A ballot cast in the said representation vote was objected to by the scrutineer for the Applicant, present at the counting of the ballots. This ballot contained a mark resembling an “X” which was neither in the “yes” or “no” portion of the ballot, but in the portion of the ballot bearing the name of the Applicant. The Returning Officer ruled that this was a ballot marked against the Applicant. The Applicant submits that the Returning Officer erred in this ruling and that the said ballot:

(a) Either is a ballot marked in favour of the Applicant since the “X” appears on the portion of the ballot bearing the name of the Applicant; or, in the alternative,

(b) The ballot is a spoiled ballot since it bears an “X” in neither the “yes” or “no” portion of the ballot.

As a result, the Applicant submits that the Report of the Returning Officer should indicate either, eleven ballots marked in favour of the Applicant and nine ballots marked against the Applicant, or in the alternative, ten ballots marked in favour of the Applicant and nine ballots marked against the Applicant.

3. The “X” on the ballot in dispute was marked on the portion of the ballot in which is printed the name of the applicant. However, the “X” is marked adjacent to the “No” portion of the ballot. The applicant argued that the test for the validity of a ballot is that it does not disclose the identity of the voter and does disclose the intention of the voter. See, for example, the *National Starch and Chemical Co. (Canada) Ltd.* case, [1968] OLRB Rep. 285. The applicant agreed that the ballot in question did not disclose the identity of the voter.

4. The respondent and the objectors argued that the ballot in question clearly disclosed the intention of the voter as being a rejection of the applicant as the bargaining agent.
 5. In our view the marking of the "X" in the portion of the ballot which bears the applicant's name is not to be reasonably interpreted as a vote in favour of the applicant.
 6. The Board now considers whether the ballot should be regarded as a spoiled ballot or a ballot marked against the applicant. There ought to be finality to the Board's proceedings wherever possible and it is only in the most exceptional circumstances that the Board would direct a new representation vote. It was agreed at the hearing that the Returning Officer instructed employees, whose fluency in the English language is for the most part limited, in English and Italian on how to mark their ballots.
 7. The Board has considered all of the arguments of the parties and the facts which were placed before it. In our opinion the marking of the "X" adjacent to the space which indicates "No" rather than "Yes" is to be considered as expressing a vote against the applicant. Although the "X" is marked in the space which bears the name of the applicant; the "X", in fact, is closer to the "No" than if it had been marked in the space provided. The Board therefore finds that of the twenty votes which were cast ten were cast in favour of the applicant and ten were cast against the applicant.
 8. On the taking of the representation vote directed by the Board, not more than fifty per cent of the ballots cast were cast in favour of the applicant.
 9. The application is therefore dismissed.
 10. The Board will not entertain an application for certification by the applicant with respect to any of the employees in the bargaining unit within the period of six months from the date hereof.
 11. The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiration of thirty days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such thirty day period.
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2158-78-R Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant), v. **Peacock Lumber Ltd.** (Respondent), v. Group of Employees, (Objectors).

Certification – Petition – Practice and Procedure – Rule 48 considered – petition considered in exercise of discretion under section 7(2) – only witness to certain signatures failing to testify – whether petitioners expressing genuine change of heart – no vote ordered

BEFORE: R. O. MacDowell, Vice-Chairman and Board Members R. W. Redford and H. Simon

APPEARANCES: *B. Chercover and D. Swait for the applicant; J. Clair Peacock and A. R. Nicholson for the respondent; Cochrane J. Ronald for the group of employees.*

DECISION OF THE BOARD; May 14, 1979

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.
3. Having regard to the agreement of the parties the Board finds that all employees of Peacock Lumber Limited at Oshawa, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours a week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.
4. Accompanying the respondent's reply was a list of some 24 employees whom the respondent indicated would fall within the agreed upon unit. The list was prepared under the instruction of J. Clair Peacock, the owner of the respondent, who certified the accuracy thereof. Some 19 employees appeared on Schedule A and 5 employees (who had worked in the weeks immediately prior to the application but were not at work on the date of the application) were listed on Schedule D. The return date for three of these five employees was listed as "not determined." As a rule the Board does not consider persons who are not at work on the application date and for whom the expected date of return is "not determined" to be "employees" in the bargaining unit for the purposes of determining the union's membership support. In the circumstances of this case the Board does not see any reason to depart from this practice, but in any event, the inclusion of these persons would not affect the ultimate result, but would, in fact, increase the union's apparent membership support.
5. In support of its application the trade union filed documentary evidence of membership on behalf of some 18 of the 24 employees mentioned in paragraph 4. This documentary evidence was correct in all respects, was supported by a properly completed (Form 8) statutory declaration, and demonstrates a level of membership support well in excess of that required for certification without recourse to a representation vote. Having regard, therefore, to the statutory definition of member and the statutory prescriptions concerning membership evidence, the Board is satisfied that, on the basis of the evidence before it, more

than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on 5th April, 1979, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

6. There was also before the Board a “statement of desire”, or “petition” signed by a number of employees indicating that they wished to oppose the certification of the applicant. This petition included the names of some employees who had signed membership cards and had paid at least one dollar in respect of membership fees and were, therefore, “members” of the union within the meaning of section 1(1)(j) of the Act. These “members” had had a purported change of heart, and now allegedly no longer wished to support the applicant.

7. Neither “statements of desire” nor “petitions” are mentioned in The Labour Relations Act itself, but they do appear to be contemplated by Rule 48 of the Rules of Practice (R.R.O. 1970 Reg. 551 as amended.) The Board has a long established practice of accepting such petitions and exercising its discretion to order a representation vote where the petition is voluntary, complies with Rule 48, and contains the signatures of a sufficient number of persons who have previously signed membership cards, that there is some doubt whether the union’s “members” continue to support its certification. In *Radio Shack*, [1978] OLRB Rep. Nov. 1043 (at p. 1046) the Board explained the effect of a petition in the following way:

16. Having regard to the statutory definition of “member” and the provisions concerning membership evidence, the Board is satisfied that more than fifty-five per cent of the employees in bargaining unit #1 are “members” of the union, and that therefore the union may be certified without a representation vote. However, section 7(2) of the Act gives the Board the discretion to order a representation vote where it considers it advisable to do so. The practice of the Board is to exercise this discretion in favour of ordering a representation vote where a sufficient number of the employees, who have been found to be union “members”, subsequently indicate that they no longer wish to support the union. When faced with this “change of heart”, the Board will order a representation vote in order to satisfy itself that, in addition to meeting the statutory membership support requirements, the union continues to enjoy the support of its members.

17. The “change of heart” will often take the form of a petition or statement of desire indicating that the signatories no longer wish to support the union. There is no specific form required for such petition, but it must comply with the requirements of Rule 48, and clearly indicate the member’s change of heart. Typically, the petition in opposition to the union is signed by members who have indicated their support only a few days before. Moreover, while an employee can be reasonably assured that his support for the union will not be communicated to his employer, he may have no such assurance concerning his refusal to sign a petition opposing the union. In these circumstances an employee may sign a petition out of fear that his refusal to do so will be made known to his employer rather than a genuine opposition

to the union. It is for this reason that the Board undertakes the enquiry into the origination and circulation of the petition contemplated by Rule 48(5), in order to satisfy itself that the statement in opposition to the union is truly voluntary.

18. The statement of desire filed in opposition to the application bears a sufficient number of signatures which correspond to the signatures of persons in the full-time bargaining unit who signed membership cards that, if proven to be a voluntary expression, will cause the Board to exercise its discretion under section 7(2) of the Act and direct the taking of a representation vote

8. Rule 48 casts upon the petitioners an onus to call evidence as prescribed by 48(5), and to generally demonstrate that the petition is voluntary. The Board must be satisfied that when the members signed the petition, they were evidencing a genuine change of heart and were not motivated by a concern that their failure to sign would be communicated to the employer, or could result in reprisals. It must be clear that the circulation of a petition is free from the actual, or perceived, influence of management. In this respect the Board takes the same approach as it does with union membership evidence. (See, for example, *Veres Wire*, [1976] OLRB Rep. July 337 where the involvement in a union organizing campaign of a person reasonably perceived to be managerial, prompted the Board to reject the union's membership evidence because it was not satisfied that the "members" had signed voluntarily.) In *Radio Shack, supra*, the Board commented:

24. The Board has long held that there is an onus on a party relying on a statement of desire in opposition to an application for certification to establish that the "sudden change of heart" by those who have signed for the union and shortly thereafter repudiated the union, represents a voluntary change of heart. The Board recognizes the delicate and responsive nature of the employer-employee relationship and having regard to it, is circumspect in its assessment of the voluntariness of any statement of desire which bears the signatures of employees who have also signed cards in support of the union. The Board's approach to these matters is described in the leading *Pigott Motors* case, 63 CLLC 16,264 in the following terms:

"In view of the responsive nature of his relationship with his employer and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influence, obvious devious, which may operate or impair or destroy the free exercise of his rights under the Act. It is precisely for this reason and because the Board has discovered in a not inconsiderable number of cases that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence of a form and of a nature which will provide some reasonable assurance that a document such as a petition signed by employees purporting to express opposition to the certification of a trade union, truly and accurately reflects the voluntary wishes of the signatories."

Having regard to the sensitive nature of the employer-employee relationship, the Board has consistently held that it must be governed by the overall environment in the work place in deciding whether or not the statement of desire represents a voluntary expression of those who signed it. If the evidence establishes that the hand of management has been actively involved in its origination, preparation or circulation, the Board will dismiss the statement. The Board will also, however, dismiss the statement if the evidence establishes that an employee might reasonably suspect the involvement of management and hence be concerned as to whether or not management might become aware of his decision to sign it or not to sign it. (See *Morgan Adhesives of Canada Ltd.* [1975] OLRB Rep. Nov. 813 and the cases cited therein.)

9. The petition was prepared by Mr. Ronald Cochrane who appeared and gave *viva voce* evidence in support thereof. Cochrane testified that by the time the Form 5 Notice of the certification application had been posted, (i.e., by March 30) a number of union members had begun to have second thoughts. He decided to organize opposition to the union and with the help of his brother-in-law, drafted the petition document on April 3, 1979. The petition was circulated by Cochrane and "P2". (Because of section 100 of the Act and the secrecy of employees' support for, or opposition to the trade union, the discussion hereunder will refer to the petitioners by number unless they voluntarily chose to identify themselves.) Cochrane testified that the petition was in the hands of P2 for most of the morning of April 4th and it was P2 who witnessed the signatures of P6, P9, P10 and P11. Cochrane testified that he was not present when these signatures were solicited, and has no personal knowledge as to the manner in which each of these signatures was obtained. Arnold Miller testified that mid-morning he saw P2 presenting the petition to three other employees one of whom was signing it. The names of these employees were revealed to the Board. Since (according to Cochrane) P2 witnessed the signatures of P9, P10 and P11 and since the signatures were solicited in sequence, it would appear, having regard to Miller's observations, that P2 may well have witnessed the signatures of P6, P7 and P8 in addition to those that Cochrane mentioned. P2 did not appear or give evidence.

10. All of the signatures, with the exception of P13, were solicited on company premises and company time. The petition itself was mailed by registered mail on April 5 – a form of transmission which is not only mandated by Rule 50, but was imperative in the present case, because this was the only way (other than by personal delivery) that the petition could be considered "filed" with the Board prior to the terminal date. Mr. Cochrane said that he mailed the petition by registered mail simply because it was important. Later he said that the petition had to be in by April 5 because the *trade union* had told him so. (Even if petitions had been discussed at the union meeting on March 27, there was no April 5th terminal date established at that time.) Later still, Mr. Cochrane testified that it was the Form 5 notice which contained the necessary information; as, in fact, it does.

11. Cochrane stated that he left the company premises around noon, after advising the respondent that he was "going home sick." In fact, he went to P13's home to collect his signature and returned to the company premises in mid-afternoon in response to a telephone call from David Crabtree (made from the respondent's office area) advising him that there were other employees who now wished to sign the petition. Despite the fact that he was "off sick" he circulated openly on the company property in an effort to collect two further signatures. Although at first Cochrane could not recall having spoken to Nicholson (the

foreman) on that afternoon, on further cross-examination he admitted having done so – although he did not admit that the conversation had taken place in his car. He denied going into the office after he had completed collecting the further signatures. Having regard to the evidence of the other witnesses, the Board is satisfied that Cochrane did spend about 10 minutes in his car with Nicholson, and that afterwards he went into the office, where the owner and the other non-bargaining unit personnel were located. Thereafter Cochrane left the premises. He was “off sick” on the following day when the petition was mailed. The evidence indicates that P2 was also off work on the afternoon of April 4 and on April 5. This evidence may simply imply an imperfect recollection of events on Cochrane’s part, and, on the part of the respondent, an unusual leniency in granting sick leave to employees who are obviously not sick. The union asks the Board to infer active or tacit employer participation in the petition.

12. The Board in *Radio Shack* noted the importance of the “atmosphere” in which the petition was circulated and the “change of heart” took place; although it should also be stressed that employer antipathy to unionization is neither unusual, nor illegal. What was the atmosphere in the present case? In addition to Cochrane, the Board heard from three other employees, and from A. R. Nicholson, the respondent’s foreman. Mr. Nicholson is responsible for the hiring, firing and day-to-day supervision of the employees.

13. On the evening of March 27, a number of employees attended a union meeting at a local Holiday Inn. The meeting was organized through the efforts of J. F. Mosher, who Cochrane testified was known to be the principal advocate of unionization. That evening Nicholson made telephone calls to the homes of Mosher, D. Crabtree and A. Miller and enquired where they were, and whether they were at the Holiday Inn. In his evidence Nicholson admitted making these calls, which were obviously intended to ascertain whether the employees were attending the union meeting. The Board has no evidence of any other telephone calls, although Nicholson’s enquiries were the subject of discussion among the employees. On March 28 Mosher (and two other employees) were laid off – a termination which he regarded at the time as permanent but which Nicholson advised the Board was only for a temporary period. Mosher had no previous notice that he could be laid off, and it is not surprising that, in the circumstances, he concluded that it was motivated, at least in part, by his union activities the night before. Cochrane testified that the employees were aware of both Nicholson’s telephone calls and Mosher’s “termination.”

14. During the days immediately preceding the petition there was a widespread rumour that hours of work and overtime would be reduced. The rumour was based upon conversations allegedly overheard in the employer’s offices, however there is no evidence whatsoever to demonstrate that any such conversations took place, or that the rumour emanated from the respondent, or was connected in any way with any member of management. Nor can the Board assign much significance to the fact that on April 4th a German shpeherd dog was brought on the premises by the owner, although Mr. Miller, at least, was disturbed by this event. Mr. Miller admitted being told that Mr. Peacock was taking care of the animal for a friend. While this is hearsay, there is no evidence to suggest that there was anything improper in Peacock bringing the animal on the premises at that time.

15. Both Miller and Crabtree gave evidence before the Board that they were, and are, concerned for their job security. The Board can give little weight to such subjective impressions in the absence of some evidence that the concern was reasonable (although perhaps

wrong.) Here, of course, we have the uncontradicted evidence that Nicholson had made enquiries about Mosher, Miller and Crabtree, had established that all three had attended the union meeting and that Mosher, the most active union supporter, was apparently "terminated" on the very next day. Both Crabtree and Miller testified that they had discussed the petition with a group of employees at lunch time on April 4, and they had been advised that the petition would prevent the organization of the union and that they should "look out for themselves" and sign it for their own protection. Crabtree testified that he was afraid that the employer would "get rid of us" if they didn't sign the petition, and it was for this reason that he called Cochrane at his home, and asked him to return to the company premises on the afternoon of April 4 so that he (Crabtree) would sign the petition. Cochrane did return and Crabtree did sign.

16. Can the Board, in all the circumstances, be satisfied that when the employees signed the petition they were expressing a genuine and voluntary "change of heart" about their union membership and were not motivated by a concern for their job security, or a fear that their failure to signify their opposition would be communicated to their employer, and might result in adverse consequences? Having regard to the atmosphere in which the petition was circulated we are not satisfied that the petition is voluntary. However, even if we were to find (as we do) that Crabtree's signature does not evidence a voluntary change of heart, and discount his signature without making any inference concerning the signatures of the other employees, the petition could not prompt a representation vote. P2 witnessed a minimum of four signatures, and probably more if Miller's evidence is accepted; yet P2 gave no evidence concerning the manner in which each of these signatures was obtained. Rule 48(5) provides as follows:

48(5) The Board may dispose of the application without considering the statement of desire of any employee who fails to appear in person or by a representative and adduce evidence that includes testimony in the personal knowledge and observation of the witness as to,

- (a) the circumstances concerning the origination of the statement of desire; and
- (b) the manner in which each signature on the statement of desire was obtained.

In contrast, the union's documentary evidence complied in all respects with the Act and the Rules. If these four signatures are also discounted as being insufficiently proved, the remaining signatures on the petition, even if voluntarily affixed, do not evidence sufficient overlap to justify exercising our discretion to order a representation vote. The trade union would continue to have the unequivocal support of more than fifty-five per cent of the employees in the bargaining unit. In the result, therefore, the Board repeats the finding in paragraph 5 that it is satisfied, on the basis of all the evidence before it, that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on 5th April, 1979, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

17. The trade union also argued that it was entitled to certification pursuant to section 7a of the Act. In view of our finding that the trade union is entitled to certification pursuant to section 7 by reason of its membership support, it is unnecessary to deal with the argument concerning the application of section 7a.

18. A certificate will issue to the applicant.

1474-78-R Carpenters' District Council of Toronto and Vicinity, Locals 27, 666, 681, 1133, 1747, 1304, 1963, 2482, 2480, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant), v. **Pentagon Construction Canada Inc.**, (Respondent).

Bargaining Unit – Certification – Construction Industry – Whether Board will restrict bargaining unit to a particular sector – rationale for continuing with multi-sector certification reviewed

BEFORE: N. B. Satterfield, Vice-Chairman, and Board Members H. J. F. Ade and C. A. Ballentine.

APPEARANCES: *Harold F. Caley and Tony Grizolla for the applicant; G. Grossman, B. Foote and J. Trim for the respondent.*

DECISIONS OF THE BOARD; May 2, 1979

1. The Board finds that Locals 27, 666, 681, 1133, 1747, 1304, 1963, 2482, 2480, 3227 and 3233 of the United Brotherhood of Carpenters and Joiners of America are trade unions within the meaning of section 1(1)(n) of The Labour Relations Act. The Board further finds that they are constituent trade unions of the applicant.

2. The Board further finds that the applicant is a council of trade unions within the meaning of section 1(1)(g) of The Labour Relations Act.

3. The Board is satisfied that the constituent trade unions of the applicant have vested appropriate authority in the applicant to enable it to discharge the responsibilities of a bargaining agent within the meaning of section 9(1) of The Labour Relations Act.

4. In this application for certification under section 108 of The Labour Relations Act, the applicant has applied for certification of all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman. The respondent agrees with the applicant's description except that the respondent wishes to restrict the bargaining unit to apply only in the industrial, commercial and institutional sector ("the I.C.I. sector") within Board Area #8, the geographic area described. The project on which the employees were engaged in on the date of the application involved work in

that sector. As a result, the matter was put on for hearing on the issue of whether the bargaining unit should be restricted to the I.C.I. sector.

5. The issue of whether the Board should grant bargaining rights for units in the construction industry described in terms of a particular sector of the industry has been heard by the Board on prior applications, most recently in *Lyle West Electric Limited*, [1978] OLRB Rep. Nov. 1000. This was the first instance since the coming into effect of the province-wide bargaining part of the Act in which the issue of certification by construction industry sector was raised. In the *Lyle West* decision, *supra*, the Board outlined the evolution of statute and case law pertaining to the determination of bargaining units in the construction industry. The Board was being asked in that case to describe the unit in terms limiting it to the residential sector instead of describing it without reference to sector. The respondent Lyle West was seeking to insulate itself from the province-wide, multi-employer bargaining in the I.C.I. sector. The Board, having regard for the scheme of the Act insofar as construction industry bargaining units are concerned, found that to be insufficient reason to restrict the unit to the residential sector.

6. The respondent in the instant case submits the following three reasons as to why the Board should restrict certification to the I.C.I. sector.

- 1) The Legislature, in the province-wide bargaining part of the Act, has singled out for special attention the I.C.I. sector from the other sectors of the construction industry by making employees in that sector the appropriate bargaining unit for a provincial agreement as defined in section 125(e) of the Act. The Board, therefore, should issue certificates which correspond to the bargaining unit in the provincial agreements.
- 2) The result, were the Board not to restrict the bargaining unit to the I.C.I. sector, would be to place the respondent in a position of having to negotiate one or more additional collective agreements instead of having one agreement for one certificate.
- 3) The predominant practice in the construction industry has been to negotiate separate collective agreements in separate sectors of the industry. These agreements, in respect of similar work jurisdictions, vary in terms of such conditions as bargaining agent, wages and hours of work. Thus, members of one trade union who perform work in one sector may not perform that same or similar work in another sector.

7. The evidence adduced by the respondent appears largely to be in support of the third reason advanced by the respondent. The following facts are established from this evidence.

8. The applicant, directly in its own right and on behalf of its constituent locals or through its parent organization the United Brotherhood of Carpenters and Joiners of America, is or has been bound to collective agreements in the I.C.I., residential, heavy engineering and the electrical power systems sectors. One of the applicant's constituent locals, Local

1747, is a party to a multi-trade collective agreement with the Metropolitan Toronto Apartment Builders Association which applies to high-rise residential construction within the residential sector. The collective agreement in the I.C.I. sector to which the applicant is bound is a provincial agreement within the meaning of section 125(e) of the Act. These various agreements establish different working conditions in their respective sectors. For example, wage rates for carpenters are lower in the residential sector than in the I.C.I. sector and the hours which may be worked at straight time rates of pay are longer in the residential and heavy engineering sectors than in the I.C.I. sector. Another difference between the residential and I.C.I. sectors is in the work jurisdiction claimed by the applicant, most notably in concrete construction forming work. This work is performed by carpenters in the I.C.I. sector and by labourers in the residential sector in Board Area #8.

9. The respondent's argument in support of its request that certification be restricted to the I.C.I. sector was made within the context that, the Act having been amended to incorporate the provision of the province-wide bargaining part, it is more appropriate for the Board to reassess its policy in regard to the determination of appropriate bargaining units in the construction industry. The respondent advanced its arguments in support of its three reasons for making its request within this framework of the impact of the change which has occurred in the Act.

10. In support of its first reason, the respondent argued that the Legislature has effectively circumscribed the Board's function of determining what unit of employees is appropriate for collective bargaining purposes in the construction industry. The respondent submits that this results from the Legislature having decided that a unit of employees who are employed in the I.C.I. sector is an appropriate unit to be described in a provincial agreement as defined by section 125(e) of the Act. The respondent submits further that this proposition is re-inforced by the reference in section 134(2) of the Act to provincial agreements being binding on employers "... only in respect of those employees ... who are employed in the I.C.I. sector of the construction industry ...". The effect of these provisions, according to the respondent, is that the Legislature has determined for the Board what is the appropriate unit for a group of employees as contemplated in section 125(a) of the Act. Alternatively, if the Board should find that is not the result of the changes in the Act, then the Board should be strongly influenced in its determination of what is an appropriate unit in the construction industry by this legislative singling out of the I.C.I. sector.

11. The respondent submits, in support of its second reason, that the Board should look ahead to some potential consequences which might arise in the collective bargaining process from the Board's present practice of determining bargaining units in the construction industry without reference to sector. The respondent argues, for example, that this policy of the Board applied to the instant case would result in the respondent being bound immediately to a provincial agreement in respect of its employees in the I.C.I. sector. Yet it might be required to bargain in respect of other sectors in which it might not have any employees. The respondent argues further that this could lead to a strike being called against it in these sectors, which in turn could lead to a picket line being set up at the respondent's I.C.I. projects. A strike of its employees covered by the I.C.I. provincial agreement would be unlawful, yet, according to the respondent, if they honoured the picket line, it would be powerless to enforce the no strike provisions of this agreement. The respondent bases this conclusion on the Board's finding in *Canteen of Canada Limited*, [1978] OLRB Rep. Mar. 207 that the Board had no authority under the Act to restrain picketing at a secondary location of the employer.

12. Finally, the respondent argues that certification on a sector by sector basis is essential if the Board's policy is going to pay heed to the prevalent practice in the construction industry of negotiating separate collective agreements for the various sectors. The respondent maintains that this is the way in which the collective bargaining process has recognized the varying needs of the sectors insofar as conditions like hours of work, rates of pay and work jurisdiction are concerned, each agreement being tailored to the specific needs of the sector to which it applies. Thus certification by sector would be compatible with what the respondent claims is the reality of collective bargaining practices in construction.

13. The Board stated in paragraph 11 of *Lyle West, supra*, that its frame of reference for determining appropriate bargaining units for certification in the construction industry, which is drawn from sections 106 and 108 of the Act, was not changed by the enactment of The Labour Relations Amendment Act, 1977, S.O. 1977, c.31, the amendment which introduced the sections incorporated in the province-wide bargaining part of The Labour Relations Act. The Board then went on to state further that these amendments were directed towards the process of collective bargaining rather than the acquisition of bargaining rights by certification. This position of the Board clearly rejects the respondent's proposition that the Legislature has circumscribed the Board's authority for determining appropriate employee bargaining units in construction by the enactment of the province-wide bargaining amendments. Therefore, having regard for the Board's position and having regard further for the fact that the Act neither expressly empowers the Board to nor prohibits it from determining construction industry employee bargaining units by reference to sector, the remaining question is whether there is compelling argument in the instant application for the Board to alter its policy for dealing with construction industry certifications as a result of the impact of the province-wide bargaining provisions.

14. The Board is not persuaded by the respondent's argument that prevailing practices in construction industry collective bargaining are going to be frustrated by continuation of the Board's policy to determine appropriate bargaining units without reference to sector. All of the practices and conditions of which it speaks have existed over many years, including the years since the concept of sectors and the scheme of employer accreditation was introduced in 1970. There is nothing in the respondent's argument to convince the Board that these practices and conditions are in any way going to be adversely affected by the Board's policy regarding definition of bargaining units remaining unchanged under the new bargaining provisions. The respondent's concern for a potential future problem regarding enforcement of the no strike provisions of provincial agreements when "lawful" picketing at secondary sites of the employer occurs is not well founded in the Board's view. The Board has found, depending on the specific facts involved, a refusal to cross such a picket line to be an unlawful strike and has issued effective cease and desist orders against the offending employees under section 123 of the Act, or its non-construction counter part in section 82. The employer in the *Canteen of Canada* case, *supra*, was seeking a direction in respect of the picketers and not the employees who were refusing to cross the picket lines.

15. For the reasons stated by the Board in *Lyle West, supra*, the Board in the instant application does not consider it appropriate to vary its policy of determining the appropriate bargaining unit without reference to sectors.

16. Therefore, the Board further finds that all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of

York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

17. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of one or other of the constituent trade unions of the applicant and therefore, pursuant to section 9(3) of The Labour Relations Act, are deemed to be members of the applicant on December 6, 1978, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

18. A certificate will issue to the applicant.

0255-79-R Service Employees Union, Local 268, (Applicant), v. Plummer Memorial Public Hospital, (Respondent).

Appropriateness – Bargaining Unit – Certification – Parties agreeing to exclude students from part-time bargaining unit – Board not accepting parties' agreement – students employed during school vacation period not an appropriate bargaining unit

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members M.J. Fenwick and W. Gibson.

APPEARANCES: *Tom Christon and Joy Mac Phail for the applicant; Robert Budd and Tom Yukich for the respondent.*

DECISION OF THE BOARD; May 28, 1979

1. This is an application for certification.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.

3. In this application for a unit of part-time employees both parties sought to exclude students employed during the school vacation period. Where students employed during the school vacation period are excluded from a bargaining unit of full-time employees and an application for part-time employees is filed it is the practice of the Board to include both the part-time employees and the students employed during the school vacation period in the bargaining unit. The Board's practice is predicated upon its belief that students employed during the school vacation period could not form a viable bargaining unit standing alone and even if they could, the result would be to create an unduly fragmented situation. While the Board is receptive to agreements of the parties in respect of bargaining unit de-

scriptions it will not accede to these arrangements where the result is to do violence to its policies. The Board is of the view that the agreement of the parties in this case to exclude students employed during the school vacation period from a unit of part-time employees would do fundamental violence to the policy of the Board in this regard and accordingly, the Board hereby finds that all employees of the respondent at Sault Ste. Marie, Ontario in the district of Algoma, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians technical personnel, supervisors, persons above the rank of supervisor, foremen and persons above the rank of foreman, chief engineer, office and clerical staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

4. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on May 15, 1979, the terminal date fixed for this application and the date which the Board determines under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

5. A certificate will issue to the applicant.

2081-78-R Emery Baechler, (Applicant), v. United Brotherhood of Carpenters and Joiners of America, Local 3054, (Respondent), v. Selinger Wood Ltd. (Intervener).

Petition – Practice and Procedure – Termination – Applicant employee wishing to withdraw – other employees at hearing granted status to proceed with application – employer referring employees to lawyer – employer advising employees legal fees would be paid by company – application dismissed

BEFORE: Rory F. Egan, Alternate Chairman, and Board Members H. J. F. Ade and C. A. Ballentine.

APPEARANCES: *Emery Baechler on his own behalf; J. Melnitzer and Adam Salvona for the respondent; R. M. Parry and R. A. Selinger for the intervener; Gerrit H. Schoemaker and Fred Anderson in support of the application.*

DECISION OF THE BOARD; May 11, 1979

1. This is an application under section 49 of The Labour Relations Act for a declaration that the respondent no longer represents the employees of the intervener in the bargaining unit for which it is the bargaining agent.

2. The applicant advised the Board at the hearing that he was withdrawing the application. However, two employees who were signatories to the document filed in support of

the application were present at the hearing and made it known that they wished to have the Board proceed with the matter.

3. The Board heard evidence from Mr. Schoemaker with respect to the origination of the application and the manner in which the signatures thereto were obtained.

4. Mr. Schoemaker testified that because of dissatisfaction with the respondent, he attended on a member of management and, as a result, he was referred to a lawyer. Upon inquiring of management as to who would be responsible for the payment of the legal fees involved, he was told not to worry about them, that the matter would be taken care of by the company.

5. It is a requirement of section 49(3) of the Act that the Board determine that not less than forty-five per cent of the employees in the bargaining unit have voluntarily signified in writing that they no longer wish to be represented by the trade union.

6. In view of the involvement of management described by Mr. Schoemaker, the Board is unable to find that the document presented in support of the application was voluntarily signed by the employees whose names appear thereon. In the circumstances, the Board has no alternative but to dismiss the application.

7. In view of the foregoing finding, it is unnecessary for the Board to deal with objections raised by the respondent as to the timeliness of the application.

1826-78-U Service Employees International Union, Local 204,
(Complainant), v. **St. Raphael's Nursing Homes Limited**, (Respondent).

Discharge for Union Activity – Section 79 – employer alleging discharge for cause – employer unaware of union activity – no evidence of anti-union animus – grievor not union organizer but only member – complaint dismissed

BEFORE: Arthur Haladner, Vice-Chairman and Board Members J. D. Bell and O. Hodges

APPEARANCES: *G. Charney, G. Davis and C. St. Louis for the complainant; C. Meawasige and Hugh J. MacLean for the respondent.*

DECISION OF ARTHUR HALADNER, VICE-CHAIRMAN AND BOARD MEMBER J.D. BELL; May 14, 1979

1. This is a complaint brought under section 79 of The Labour Relations Act alleging that Cecilia St. Louis was discharged because of her participation in, and activities on behalf of, the complainant, and that the dismissal was intended to thwart the complainant's organizing campaign.

2. The respondent operates a nursing home in Springhurst. On January 16, 1979 an

inspection of the premises was carried out by Ms. McCall of the Nursing Homes Inspection Branch of the Ministry of Health. During her inspection, residents of the Home complained to Ms. McCall about the treatment they had received from one of the nurses' aides. Specifically, they complained of being abused. On January 16th these complaints were brought to the attention of Ms. Meawasige, the respondent's director of nursing. Meawasige then interviewed the residents concerned, who identified Miss St. Louis as the aide against whom the complaints had been made.

3. Mrs. S., a resident of approximately 80 years of age, complained of having been left on the floor, after she had fallen, by St. Louis, who was alleged to have closed the door behind her. Miss R., who is 88, made a similar complaint – that she was left on the floor by St. Louis after being made to sit on a bed-pan. According to Meawasige, Miss R.'s allegation was confirmed by another resident, who felt that St. Louis had been abusive of R. because she had soiled her bed. After speaking to the residents, Meawasige spoke to Vera MacDonald, St. Louis' supervisor, who confirmed that the incidents complained of did, in fact, occur.

4. After speaking to MacDonald, Meawasige posted a notice for a meeting with all staff, to be held January 23rd, at 2.00 p.m. At this meeting, which was called at the request of the inspector – so that the staff could be apprised of the "seriousness of the matter", the staff corroborated that St. Louis was the person against whom the complaints had been made. At this point, Meawasige advised that she had decided to fire St. Louis, and asked if any one considered that unfair. According to Meawasige, no one said it was. Meawasige testified, however, that the decision to fire St. Louis had already been made.

5. St. Louis did not attend the meeting of January 23rd. When she came to work on January 26th, she was given a written notice of termination, effective January 31st.

6. In her testimony before the Board, Meawasige denied any knowledge of an organising campaign. She testified that, prior to the complaint being filed, she had no inkling of any union activity. Her evidence was that St. Louis was fired solely because of the complaints regarding her treatment of residents.

7. Cecilia St. Louis, a part-time employee of ten months, acknowledged that the incidents complained of did, in fact, occur. She did not, however, consider that she had done anything improper. Her evidence was that the residents, in both cases, had been left for a short time only and because of the exigencies of the situation. She told the Board that S., who had "slid" to the floor on the way to the bathroom, was left there until lifting assistance could be obtained. S. weighs over two-hundred pounds and cannot be lifted alone. The door was closed, St. Louis said, because S. was yelling and there were other residents in the vicinity. R. was left, St. Louis testified, so she could obtain clean linen for her bed, which had been soiled. R. was permitted to sit on the floor because she was unable to stand and there was no place else for her to sit. A bed-pan was used because R. still required it. St. Louis testified that in the past R. would stand holding on to the bed rail during a bed change but, on the occasion in question, she was unable to hold herself up.

8. In support of her contention that she had done nothing improper, St. Louis pointed out that prior to her discharge she had received no complaints regarding her treatment of residents. She testified that Vera MacDonald and another supervisor, named Con-

nie, were aware of the incidents in question, both of which occurred months before her discharge. In neither case was St. Louis disciplined or told that she had acted improperly.

9. Miss Lilian McLean, a part-time nurse for the respondent, gave evidence that, in her opinion, St. Louis' conduct was not, in the circumstances, improper.

10. Goldie Davis, an organizer for the complainant, testified that St. Louis signed a card on the morning of January 17th. St. Louis gave evidence that she told Vera MacDonald two or three days earlier of her intention to join a union. This, after she had received a telephone call from Goldie Davis. She told the Board that she did not speak to anyone else about the union, and that she had never been a union member.

11. St. Louis, a full-time student at Parkdale Collegiate Institute, testified that she did not attend the meeting on January 24th because she was writing an examination, and was unaware that her conduct would be the topic of discussion. She denied knowledge of the inspector's visit of January 16th. However, she did not deny attending at work that afternoon. According to Meawasige, St. Louis was on duty.

12. The onus, in cases such as this one, is upon the employer to establish that the employee's discharge was for reasons unrelated to a decision to join a union. Under the Act, it is an unfair practice to discharge someone for their union membership or activities, and it is incumbent upon the employer to come forward with an explanation for conduct from which it can be inferred that the employee's discharge was not motivated by an anti-union animus.

13. The respondent in this case has testified that the employee was dismissed because of the complaints received about her treatment of residents, and that it had no knowledge of any union activity. The complainant, on the other hand, asks the Board to draw the inference that the discharge was motivated, at least in part, by St. Louis' decision to join a union. Counsel for the complainant points out that St. Louis' supervisors had knowledge of the incidents complained of, both of which occurred months before her discharge and that, in neither case was the grievor disciplined or told that she had done anything improper. Counsel points out, as well, that St. Louis was fired without an opportunity to explain her actions, which counsel says were fair and reasonable in the circumstances.

14. A precipitous discharge and one which, on the face of it, appears less than fair, might in different surrounding circumstances give rise to an inference that the reasons given by the employer were not the real, or the only ones, and that the employee's union affiliation was a factor, if not the cause, of the dismissal. The evidence before the Board does not, however, favour such an inference. Although the employee's discharge may not have stood up, if challenged by a grievance under a collective agreement, the evidence establishes that the incidents complained of did occur and that they were a source of concern to the inspector as well as the residents. The incidents, it is true, did not draw so much as a reprimand from the employer's supervisors. However, the evidence is that upon learning of them, the nursing director took immediate action.

15. Had there been evidence of anti-union conduct on the part of the respondent, or evidence from which the respondent could have been fixed with knowledge of union activity, the Board, having regard to Meawasige's contention that she knew nothing of the union, would likely have concluded that her explanation for the firing was not to be believed. How-

ever, not only was there no evidence of anti-union conduct, there was no evidence that the complainant was engaged in an organizing campaign. Apart from the evidence that St. Louis was approached by the complainant and signed a card – on the morning after the inspection which precipitated her dismissal – there was no evidence that a campaign was in progress. The union organizer did not state that other employees were approached or asked to sign cards. The Board did hear evidence from St. Louis that Vera MacDonald had been told of her intention to join a union in advance of January 16th. However, Meawasige was not asked whether she had been apprised of this, and MacDonald was not called as a witness. As stated, Meawasige denied any knowledge of union activity. When these considerations are taken into account, the Board is unable to find that Meawasige had knowledge of St. Louis' union affiliation. The possibility that she may have known is not, by itself, sufficient to cause us to reject her testimony.

16. A final factor of relevance is that St. Louis did nothing more than sign a card. She was not an organizer and she did not discuss the union with other employees. While the Board's jurisprudence is replete with examples of employers discharging employees for their union activities, it is not that common to find the discharge of a single employee, who has done nothing more than express an intention to join a union. It will be recalled that, in this case, the other employees were told that the employee was being fired because of complaints regarding her treatment of residents. Thus, there was no evidence from which it could be inferred that St. Louis was being made an example – in order to chill unionization.

17. Our conclusion is that the evidence does not favour the inference that St. Louis' discharge was motivated by an anti-union animus on the part of the respondent. Nor is this a case in which the evidence is so evenly balanced that no clear inference can be drawn. Such a conclusion would have allowed the Board to fall back on the rule relating to the burden of proof, and make a finding against the employer, the party upon whom the burden resides. The Board finds that the inference that the employee was fired because of the complaints received about her treatment of residents is clearly the most probable. In sum, while St. Louis' discharge appears to have been less than fair, it was not so unfair as to cause the Board to conclude, on the evidence before it, that it was motivated by an anti-union animus.

18. Accordingly, the complaint is dismissed.

DECISION OF BOARD MEMBER O. HODGES:

1. I dissent.

2. In my opinion the employer has not met its onus to come forward with a satisfactory explanation for the discharge. Ms. Meawasige appears to be the only person who thought the old incidents serious enough to warrant discharge. No other reasons for the discharge were put forward. The employer, in the person of St. Louis' immediate supervisor, Vera MacDonald, knew of the incidents when they occurred, but did not consider St. Louis' behaviour to be sufficiently irregular to report to her superior, let alone cause a reprimand or discipline of the employee involved. Lillian McLean, a part time nurse also testified that St. Louis' conduct in these instances was not improper. In view of all the evidence, I can not accept Ms. Meawasige's explanation for the discharge. I conclude that St. Louis union activity was one of the reasons for her discharge.

3. There is un rebutted evidence from St. Louis that the employer in the person of St. Louis' supervisor MacDonald, knew of her intention to join the union before the decision to discharge. Ms. Meawasige's denial of knowledge about the union is not credible. In these circumstances I draw the reasonable inference that *management* knew of the intention of St. Louis to join a union. I reach my conclusion that anti-union animus was a factor in the decision to discharge because of the weakness of the evidence in support of the alleged reasons for the discharge, and the fact that Ms. Meawasige did not follow her usual practice of speaking with employees who are said to have performed their duties in an improper way. Her explanation that she intended to give St. Louis an opportunity to defend herself at the staff meeting is incredible. Her evidence is that she had decided to fire St. Louis *before* the meeting. St. Louis was given no notice that she would be the topic of discussion at the meeting. Furthermore, Ms. Meawasige should have known that St. Louis would be unable to attend an afternoon meeting because she was a full time secondary school student. Such instances had never been discussed at staff meetings, which are not regularly held. This appears to me as an attempt to fabricate an explanation of the discharge, which was in reality motivated by anti-union animus. The timely visit by the Nursing Homes Inspection Branch and the surfacing of the previously ignored complaints against St. Louis gave management an opportunity to "nip the union in the bud."

4. The effect of the reversal of the onus, in cases such as this, as embodied in section 79(4a) has been well-stated in the *Barrie Examiner* case, [1975] OLRB Rep. 745, at page 749:

"Given the requirement that there be absolutely no anti-union motive, the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts – first, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred."

Again, in *The Corporation of the City of London* case, [1976] OLRB Rep. Jan. 990 at page 995, the Board summed it up by saying that: "the respondent must put forward a credible explanation free from anti-union motive which is established on the balance of probabilities as the only reason or reasons which precipitated the impugned activity."

5. The Board has inferred anti-union motivation for a discharge by looking to all of the circumstances surrounding the discharge, including any unusual or atypical conduct by the employer, especially where the employer's knowledge of the complainant's union activity has been established; (*Niagara International Centre*, Board File No. 1732-78-U, unreported, April 2, 1979.) The Board, in *District of Algoma Home for the Aged*, Board File No. 1406-78-R, unreported, April 27, 1979, stated:

"Where the evidence on a section 79 complaint discloses a discharge that appears unduly harsh and arbitrary given the normal circumstances in the work place, doubt may be cast by the employer as the reasons for discharge."

This is especially so where the discharge occurs during a union organizing campaign.

(*Zehr's Markets Ltd.*, [1971] OLRB Rep. Jan. 39.) Where such peculiarities exist that are not reasonably explained, the employer may fail to satisfy the burden placed upon it; (*Fielding Lumber Company Ltd.*, [1975] OLRB Rep. 665, at page 673.) In my view, the facts of this case give rise to such an inference. The discharge of St. Louis appears to be unduly harsh and arbitrary given the normal circumstances in the work place, and the reality of the incidents relied upon by the employer.

6. I find that the respondent has failed to satisfy, on the balance of probabilities, that St. Louis' discharge was not motivated, at least in part, by her declared intention to join the trade union or by a desire to interfere with the formation or selection of a trade union or the representation of employees by a trade union. Accordingly, I find that the respondent violated sections 56 and 58 of the Act. Consequently, I would order the reinstatement of Cecilia St. Louis with full redress for wages lost, and with all credits for interrupted service and attendant benefits.

1201-78-R Labourers' International Union of North America, Local 183, (Applicant), v. **Thames Steel Construction Ltd.**, (Respondent), v. Employee, (Objector).

Certification – Employee – Petition – Practice and Procedure – Reconsideration – Form 5 posted four days before expiry of terminal date – objecting employee requesting extension of terminal date – sufficient notice given – counsel subsequently retained requesting reconsideration of refusal to extend – representations made or could have been made at first hearing – shift supervisor not affecting employment relationship nor deciding policy – acting as conduit for work assignments – not managerial.

BEFORE: R. A. Furness, Vice-Chairman, and Board Members H. J. F. Ade and O. Hodges.

APPEARANCES: *S. B. D. Wahl and B. Yandell for the applicant; L. Bertuzzi and M. Pekin for the respondent; W. G. Posthumus and Douglas Grant for the objector.*

DECISION OF THE BOARD; May 15, 1979

1. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.
2. In this application for certification, the objector, Douglas Grant, requested an extension of the terminal date. The terminal date fixed for this application was Friday, October 27, 1978. There was no dispute that the respondent received the Form 5, Notice to Employees of Application for Certification and of Hearing, during the afternoon of Monday, October 23, 1978, and that Form 5 was posted on the respondent's premises during the evening of October 23, 1978, or the morning of Tuesday, October 24, 1978.
3. The Board heard evidence from Mr. Grant with respect to his request for an extension of the terminal date. He saw the Form 5 on October 24, 1978 at 9:00 a.m. Mr. Grant

informed the Board that due to his job he was only able to be in the respondent's premises for two hours each day. He testified that he was handicapped in approaching some of his fellow employees about opposing this application because he is unable to speak either the Korean or Portuguese languages. Mr. Grant informed the Board that during the evening of Tuesday, October 24, 1978, he planned what to do about opposing this application. He was absent from the respondent's premises for most of Wednesday, October 25, 1978, and did not prepare the statement of desire until that night. He made attempts to circulate the statement of desire on Thursday, October 26, 1978, and testified that he was unable to do so because of violence on the premises. On Friday, October 27, 1978, Mr. Grant gave the statement of desire to employees who spoke Korean and Portuguese languages.

4. On Friday, October 27, 1978, the terminal date for this application, Mr. Grant sent a letter by registered mail to the Board. This letter contained only one signature, his own, and expressed opposition to this application for certification. On Friday, October 27, 1978, some thirteen signatures were obtained from other employees of the respondent. However, these signatures were not filed with the Board by the terminal date for this application. Mr. Grant stated that he did not file the additional thirteen names by the terminal date because of information he received from the secretary of the Director of the Labour Relations Board. Mr. Grant has been advised that the Director is not responsible for advice given by his secretary. Mr. Grant sought to file a document which contained the additional signatures at the hearing before the Board. The Board informed Mr. Grant that it was not prepared to accept the document as a statement of desire because it had not been filed not later than the terminal date for the application.

5. After entertaining the representations of the parties, the Board ruled that, for reasons to be given, Mr. Grant had sufficient notice of this application and had sufficient time to obtain signatures in support of his opposition to this application. The Board stated that it could not direct the Registrar to extend the terminal date for this application.

6. There is no doubt that Mr. Grant had sufficient time to solicit support and signatures in opposition to this application for certification. While it initially appeared that Mr. Grant was alleging that he did not have sufficient time to obtain signatures due to his position with the respondent and his inability to speak the Korean and Portuguese languages, it became apparent that he was seeking an extension of the terminal date for this application in order to permit him to file a document which contained the additional signatures. The Board agrees that the Director is not responsible for information supplied by his secretary. Form 5 sets forth the steps which are necessary in order to comply with the Board's Rules of Procedure. These steps were not followed by Mr. Grant with respect to the document which contained the additional names. The statement of desire which was filed in opposition to this application and which was filed in accordance with the Board's Rules of Procedure contains only Mr. Grant's signature. Having regard to the evidence of membership filed by the applicant it was not necessary for the Board to inquire into the origination, preparation and circulation of the statement of desire which contained only Mr. Grant's signature.

7. At a subsequent hearing Mr. Grant was represented by counsel. Mr. Posthumus endeavoured to re-open Mr. Grant's request for an extension of the terminal date for this application by asking for reconsideration of the Board's earlier ruling by raising arguments which were either raised initially by Mr. Grant or could have been raised by Mr. Grant when he made his request for an extension of the terminal date for this application. At the

initial hearing Mr. Grant proceeded without counsel. He neither indicated his wish to retain counsel nor requested an adjournment so that he might retain counsel. The Board ruled that for reasons to be given in writing the request for reconsideration was denied.

8. In the *Lorain Products (Canada) Ltd.* case, [1978] OLRB Rep. 262, the Board stated at page 263:

The Board is given a broad authority under Section 95(1) of the Act to reconsider any decision "if it considers it advisable to do so." The Board having regard to the labour relations chaos which would result if there were not some finality to its decisions has been loathe to reconsider where the parties have been afforded a full and fair hearing unless the party seeking reconsideration can show that it has uncovered new evidence which could not have been obtained with reasonable diligence and adduced at the initial hearing and which, if adduced, would have a material and determining effect on the decision of the Board. The parties to Board proceedings are entitled to rely upon the decisions of the Board in the knowledge that they are final and conclusive unless evidence of the type referred to above is uncovered (See re *Detroit River Construction Ltd.* case, 63 CLC 16,260 at p. 1117, *York University* case, [1976] OLRB Rep., April 187, *Ottawa Journal* case, [1977] OLRB Rep. Sept. 549). The Board does not permit reconsideration for the purpose of allowing a party to repair the deficiencies in its case or to reargue the merits of its case.

9. The representations which Mr. Posthumus made before the Board could have been made at the time Mr. Grant made his representations before the Board. As the Board stated in the *Lorain Products (Canada) Ltd.* case, *supra*, the Board does not permit a request for reconsideration to be made for the purpose of allowing a party to repair the deficiencies in its case or to re-argue the merits of its case. These are the written reasons why the request for reconsideration was denied.

10. The Board heard evidence and argument with respect to the employment status of Antonio Rodrigues and his brother Antonio Jose Rodrigues.

11. Antonio Rodrigues and Antonio Jose Rodrigues work on different shifts. One of their functions is to communicate to the respondent's welders and labourers the work which is to be performed by them during given periods of time. The two brothers do not have the authority to hire, discipline or discharge employees of the respondent. Their immediate superior is John Streef Kirk, who described himself as a shop foreman or a general foreman. The respondent regards the two brothers as the foremen on their respective shifts.

12. The two brothers are responsible for checking the quality of the work of the welders, ensuring that the labourers keep the jigs supplied with material, correcting errors made by the welders and painting the finished product. In the course of checking the work of the welders the two brothers instruct the welders to correct errors in their work. From time to time the two brothers have trained labourers to become welders.

13. The two brothers are, by their own preference, paid at an hourly rate for their work. They punch a time clock in common with the welders and the labourers and speak

the Portuguese language. They also have some ability to speak the English language. They relay requests for time off from employees who speak the Portuguese language to Mr. Streefkirk. From time to time the two brothers seek employment with the respondent for friends and relatives. In one sense they even recommend such persons for employment. Their recommendations and commendations are not always acted upon by the respondent. The two brothers report to Mr. Streefkirk on the performance of welders and labourers. On occasions they make recommendations about the advancement of such employees. Once again, their recommendations are not always acted upon by the respondent.

14. The two brothers have handed out pay cheques from time to time, though not on a regular basis. The two brothers receive a higher hourly rate than the welders and the labourers. This function of handing out pay cheques causes some of the employees to comment on their status. Such comments are usually good natured and refer to them as bosses. They are responsible for ringing a buzzer which announces the commencement of the luncheon and coffee breaks. They have no power to purchase supplies or recommend wage increases for employees. When an accident occurs they are the first point of contact with the employee. However, the written report of the accident is prepared by Mr. Streefkirk.

15. The respondent argued that the two brothers are first line supervisors and referred to the *McIntyre Porcupine Mines Limited* case, [1975] OLRB Rep. 261, and the *Inglis Limited* case, [1976] OLRB Rep. 270, in support of the proposition that the discretion of the Board under section 1(3)(b) operates on two levels. In the *Inglis Limited* case, *supra*, the Board stated at pages 271-272:

The jurisprudence of this Board reveals that the discretion of the Board under section 1(3)(b) operates on two levels. It operates *firstly* to exclude persons who can affect the terms and conditions of employment and/or the employment relationship of those in the employ of the organization, and *secondly* it operates to exclude those who make decisions with respect to policy and the overall operation of the organization. In theory it can be easily seen that persons who exercise either or both types of functions would find themselves in a conflict of interest if included within a bargaining unit of other employees. In practice, however, it is often difficult to distinguish those who make decisions which would precipitate a conflict of interest from those who implement the decisions of others or who operate at a level of decision making which would not result in a conflict if they were found to be employees for purposes of the Act. The Board in the course of applying section 1(3)(b) has developed certain insights and tests which are helpful in determining the status of the persons who are in dispute in the instant case.

It is helpful to note at this point that there are two types of persons whose recommendations can potentially affect the terms and conditions of employment and/or the employment relationship. There is the first line supervisor, traditionally referred to as the foreman who directs the daily flow of work and who may or may not be responsible for a number of ancillary matters such as the imposition of discipline, the granting of time off, the scheduling of overtime, the recording of attendance etc. He may even hire and fire. There is also the technical expert whether it be in the area of time study, methods or process engineering whose responsibilities and decision making

capabilities can affect not only terms and conditions of employment (i.e. incentives, production bonus) but the employment relationship itself (i.e. lay-off). The Board in assessing the duties and responsibilities of a front line supervisor has been cognizant of the policy and organization restraints which not dilute his decision making authority and has developed the test of "effective recommendation."

"This concept has come to mean that if a person spends most of his time supervising the work of others *and* makes effective conditions of employment of those supervised, the Board may conclude that such persons are exercising managerial functions. In this sense an effective recommendation is a serious recommendation that the evidence demonstrates is usually acted upon, and therefore a recommendation that materially affects the economic lives of employees." (See McIntyre Porcupine case, *supra*).

The Board recognizes that although the foreman may not have the final and undisputed authority which he once did, his power of effective recommendation with respect to discipline, promotion, demotion, time off etc. is a managerial function within the meaning of section 1(3)(b). The foreman who effectively recommends in these area would find himself in a conflict of interest if placed in a bargaining unit with other employees. It is important to note that it is not the supervisory aspect of his function per se which creates the potential for conflict but the power of effective recommendation as it effects the employment relationship of other employees.

16. The extent of their duties has never been formally described by the respondent. Indeed, when Mr. Streefkirk was asked for his own title he mentally searched for a title and supposed that he could be called a shop foreman or a general foreman and stated that the respondent never bothered much with titles. As the Board stated in the *Sunnybrook Food Market (Keele) Limited* case, [1978] OLRB Rep. 107, the failure of an employer to clearly inform its personnel of their duties of necessity weighs against its claims when the status of an employee under The Labour Relations Act is in question.

17. The theory adopted by the Board in the two cases referred to in paragraph 13 was based upon a perception of employment relations in large corporations with a substantial infra-structure of chain of command. In the instant case the total employment complement is in the region of fifty – a small to medium sized business. Moreover, the evidence before the Board does not establish that Antonio Rodrigues and Antonio Jose Rodrigues are *either* able to affect the terms and conditions of employment and/or the employment relationship of those in the employ of the organization, *or* make decisions with respect to policy and the overall operation of the organization.

18. Antonio Rodrigues and Antonio Jose Rodrigues serve as a conduit in the assignment of work by John Streefkirk. While on occasions they may vary such assignment, the discretion which they are able to exercise is within closely confined and well defined areas. Such discretion, in our view, is not such as to justify a finding that they exercise managerial functions within the meaning of section 1(3)(b) of the Act. The Board finds that Antonio Rodrigues and Antonio Jose Rodrigues do not exercise managerial functions within the meaning of section 1(3)(b) of the Act and are included in the bargaining unit.

19. The matter is referred to the Registrar to be listed for continuation of hearing.
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0961-78-R 0962-78-R Retail Clerks Union, Local 206 Chartered by the Retail Clerks International Union, (Applicant) v. **Tip Top Tailors**, (Respondent), v. Group of Employees, (Objectors).

Appropriateness – Bargaining Unit – Certification – Whether municipal bargaining unit appropriate – difficulties organizing across several municipalities considered

BEFORE: Rory F. Egan, Alternate Chairman, and Board Members W. H. Wightman and W. F. Rutherford.

APPEARANCES: *Ted Wohl, Les Dowling, Clifford Evans and Bob Andrews for the applicant; E. L. Stringer, Q.C., D. L. Brisbin, D. Foy and E. Lazarotto for the respondent; David Crotin and Ahmed M. Cachalia for the objectors.*

DECISION OF THE BOARD; May 24, 1979

1. The Board directs that the above applications be and the same are hereby consolidated.
2. In File No. 0961-78-R the applicant applied for a bargaining unit comprising all employees of the respondent at Oshawa, save and except assistant store managers and persons above that rank.
3. In File No. 0962-78-R the applicant sought a unit comprising all employees of the respondent at Mississauga with the same managerial exclusion.
4. The respondent submitted that single store units were not appropriate for collective bargaining. It proposed a unit comprising the respondents's Regions 5, 6 and 7 which embrace Metropolitan Toronto and a geographical area outside Metropolitan Toronto, including Oshawa (and Mississauga) which the respondent has treated more or less as a cohesive unit for purposes of certain aspects of its administration, including promotions, transfers, discipline and discharge.
5. In addition to the foregoing submission, it is also the respondent's position that there should be a full-time bargaining unit and a part-time bargaining unit in accordance with the Board's usual twenty-four (24) hour designation, with managerial exclusions.
6. The Board appointed an Examiner and a Labour Relations Officer to inquire into the lists, the appropriateness and the composition of the bargaining units in these applications. A hearing was held at which the parties made representations as to the decision the Board ought to arrive at on the basis of the evidence in the report.
7. The respondent's Regions 5, 6 and 7 include the municipalities of Metropolitan

Toronto, Oshawa, Thornhill, Mississauga, Newmarket, Peterborough, Bramalea and Richmond Hill.

8. The respondent was operating twenty-seven retail stores in these areas at the time the application was made. Tip Top Tailors does not manufacture goods. It is basically in the retail business and operates a chain of men's wear retail stores across Canada. It is with respect to employees in the retail stores in the respective municipalities that these applications are made.

9. Tip Top Tailors is headed by a National Operations Manager whose jurisdiction covers the whole company. Beneath the National Operations Manager are two General Managers. They have different functional areas within their control. General Manager, A. Callegari, has under him a Personnel Manager, Administrative Manager, a Control Manager and an Operations Manager.

10. General Manager, G. Edelstone, has an Advertising and Sales Promotion Manager as well as a General Merchandise Manager answerable to him.

11. Each of the latter six managers have further managerial staff to help in carrying out the responsibilities arising under the various subordinate functions.

12. The functions of those holding the various positions referred to above were gone into at the examination and are set out in the report. The evidence establishes that a very tight control is kept over the retail outlets by this group. This extends to the selection of stock, advertising, the layout of the stores, the dressing of windows, and even the positioning of the garments within the confines of the store, pricing, and the hiring, firing and transfer of personnel. The Personnel Manager prepares and implements training programs and administers personnel files across the country and assists in evaluating people for promotion.

13. The respondent does not rely upon the degree of central control as a major or fundamental part of its case and concedes that while it is important, centralization is not dispositive of the issue. It also relies heavily upon its policy and practice with respect to the transfer of employees between the stores in the area as very persuasive factors supporting its position.

14. Both permanent and temporary transfers of employees occur between stores. Temporary transfers are the result of replacement for sickness and vacations or special events where a temporary increase in personnel is considered advantageous. These temporary transfers can last for anywhere from two days to two weeks. It was argued strongly by the respondent that the right to transfer employees throughout the region was important in training employees in the various sizes of stores in urban and suburban areas and that it is the only real way of providing promotional opportunity for salesmen as well as giving them better earning opportunities. The respondent further submitted that to restrict the bargaining unit to the area of a municipality, particularly a one-store municipality, would be to virtually prevent transfers to non-union shops and force layoffs in lieu of transfer in adverse business circumstances. A wider unit, the respondent submits, would affect the employees' job security.

15. These latter arguments with respect to the advantages that may accrue to employees by reason of transferability within the wider areas sought by the respondent are, of course, matters to be weighed by the employees concerned. In that context, at least, the decision must be left to the employees.

16. A further argument advanced by the respondent was that the smaller stores could not constitute viable bargaining units both from the point of view of numbers and because of the lack of autonomy on the part of the local managers as demonstrated by the evidence contained in the report of the Examiner. Furthermore, if only small units are organized and the larger ones are not, the tail would be wagging the dog.

17. The Act, however, upholds the right of employees to join the trade union of their choice and the fact that a large group of employees of the same respondent in another municipality does not wish to be represented by a union does not warrant the Board denying the right to representation to a smaller group in another municipality who seek to exercise it.

18. The Board has carefully considered all the evidence in the report as well as the submissions of counsel with respect thereto. The Board has also reviewed the jurisprudence including the *Usarco* case, [1967] OLRB Rep. Sept. 526; *Wix Corporation Limited*, [1975] OLRB Rep. Aug. 637; *Adams Furniture Co. Limited*, [1975] OLRB Rep. June 491; *Fotomat Canada Limited*, Board File No. 1781-78-R; and *Canada Trustco Mortgage Co.*, [1977] OLRB Rep. June 330.

19. The *Usarco* case to which constant reference is made throughout subsequent decisions and upon which reliance was placed in the present case dealt with the relationship of two different plants but, it should be noted, the plants were in the same municipality.

20. Having reviewed all of the foregoing and in particular the evidence with respect to transfers, the Board finds that the extended area bargaining unit argued for by the respondent raises an insurmountable obstacle to the rights of any of the employees to obtain union representation. That right is the foundation and base upon which the whole structure of the Act is built. To require the employees of the respondent to organize the whole area which includes so many municipalities would be to defeat the paramount purpose of the Act. In addition, the Board would point out that in defining the geographic limitations of bargaining units, the Board has held to municipal boundaries with few exceptions. The interests of the employees in the present situation outweigh any of the other factors which might have induced the Board to treat this case as an exception.

21. In the result, therefore, the Board finds that the bargaining units in each of the above applications must be limited to employees of the respondent in its retail stores in the Municipality of Oshawa in Board File No. 0961-78-R and in the Municipality of Mississauga in Board File No. 0962-78-R.

22. The applicant requested the exclusion of the assistant manager at the Mississauga store. An Examiner was appointed to inquire into the matter and a report was issued. The parties have not yet been afforded the opportunity to submit arguments on this point. The request does not affect the Oshawa application since there is no assistant manager there. The Board accordingly finds that the appropriate bargaining units with respect to File No. 0961-78-R comprise:

- (a) All employees of the respondent in its retail stores in Oshawa, save and except store manager, persons above the rank of store manager, and persons regularly employed for not more than 24 hours per week (hereinafter referred to as bargaining unit #1).
- (b) All employees of the respondent in its retail stores in Oshawa regularly employed for not more than 24 hours per week, save and except store manager and persons above the rank of store manager (hereinafter referred to as bargaining unit #2).

23. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in bargaining unit #1 at the time the application was made were members of the applicant on September 12, 1978, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

24. A certificate will issue to the applicant with respect to bargaining unit #1.

25. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in bargaining unit #2 at the time the application was made were members of the applicant on September 12, 1978, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

26. A certificate will issue to the applicant with respect to bargaining unit #2.

27. The matter of the status of the assistant manager affects, of course, the ultimate description of the two appropriate units with respect to employees of the respondent at Mississauga referred to in Board File No. 0962-78-R.

28. The membership evidence filed by the applicant with respect to Mississauga employees – whether the exclusion be of the store manager or of the assistant store manager – amounts to less than forty-five per cent of the employees in the full-time unit so that whatever the outcome on the status of the assistant manager may be, the applicant is in a dismissal position with respect to that unit on the court as it now stands.

29. Insofar as the unit in Mississauga comprising all employees regularly employed for not more than 24 hours per week is concerned, a petition or statement of objection filed in opposition to the application may, if acceptable, affect the membership evidence so as to require the holding of a representation vote.

30. The Board accordingly directs that this matter be relisted for hearing in order to hear the representations of the parties with respect to the status of the assistant manager and to inquire into the petition and all other outstanding issues with respect to these applications.

0032-79-R The North American Soccer League Players Association, (Applicant), v. **The Toronto Blizzard Soccer Club**, Prosoccer Limited, and The North American Soccer League, (Respondents).

Certification – Trade Union Status – Constitution requiring single multi-employer collective agreement – possibility of procedural difficulties arising in collective bargaining – whether affecting trade union status

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members R. D. Joyce and W. F. Rutherford.

APPEARANCES: *Maurice W. Wright, Q.C., Nimal Dissanayake, Richard A. Berthelsen and John Kerr for the applicant; C. M. McKeown, Q.C., B. O'Brien and B. W. Adams for (The Toronto Blizzard Soccer Club) Prosoccer Limited.*

DECISION OF THE BOARD; May 16, 1979

1. The name “The Toronto Blizzard Soccer Club” appearing in the style of cause of this application as the name of one of the respondents is amended to read: “(The Toronto Blizzard Soccer Club) Prosoccer Limited.”
2. This is an application for certification.
3. The applicant advised the Board at the outset that it was withdrawing the application in respect of the North American Soccer League.
4. There was no argument raised as to the constitutional jurisdiction of this Board to entertain this matter.
5. The Registrar advised the applicant by letter dated April 5, 1979 that it must be prepared at the hearing to satisfy the Board that its organization is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.
6. The applicant adduced evidence in support of its contention that it is a trade union within the meaning of the Act. The evidence establishes that on August 29, 1977 a constitution was placed before player representatives from 17 of the 18 teams then in the North American Soccer League. The draft constitution was unanimously adopted on August 30, 1977 by the player representatives in attendance and has governed the affairs of the applicant organization since that time. The constitution was filed as an exhibit with the Board. The purpose of the applicant organization, as set out in article 1 of the constitution, is to further the economic and other working conditions of players, to better and maintain relations between players, owners, coaches and staff and to execute and administer collective agreements and to resolve player grievances. The constitution provides for the election of a player representative and an alternate player representative from each club. The business of the applicant organization is carried on by a Board of Representatives which consists of the player representatives from each club and the staff director serving ex officio. The constitution also provides for a co-ordinating committee composed of six players and the staff director serving ex officio which has the authority to exercise all the powers of the Board of Representatives between meetings of the Board.

7. The applicant organization was certified by the National Labour Relations Board on September 1, 1978 as bargaining agent for all of the players in the North American Soccer League with the exception of the players signed to the two Canadian teams. The evidence establishes that the applicant organization has collected dues and actively pursued its bargaining rights as conferred by the N.L.R.B. since the date of its certification in the United States. The applicant organization has established an office in Ontario.

8. Section 1(1)(n) of the Act provides:

“‘trade union’ means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national, or international trade union, a certified council of trade unions and a designated or certified employee bargaining agency.”

In the *Toronto Pattern Works Ltd* case [1975] OLRB Rep. Dec. 911 the Board summarized the requirements which must be met by an organization seeking to be recognized as a trade union under the Act. The Board stated at paragraph 7 therein:

“In establishing its status a trade union must prove that it is an organization of employees as evidenced by a constitution, by-laws or charter which has been ratified by its members and which has as an object the regulation of relations between employees and employers. In addition, it must show that as an organization it has duly appointed officers who can carry out its objects. In effect it must prove that it is a viable entity for purposes of collective bargaining. (See *York University* case, [1975] OLRB Rep. Feb. 127; *Alcan Universal Homes* [1969] OLRB Rep. Apr. 55; *Underwater Gas Dev. Ltd.* [1967] OLRB Rep. Sept. 555.”

Having regard to all of the evidence before it, the Board is satisfied that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act and so finds.

9. Article 5 of the applicant’s constitution provides for collective bargaining between the applicant, representing all of the players in the league, and all member teams of the league and for the ratification of a single league-wide collective agreement by employers from all teams in the league. In so far as the applicant cannot compel the club to bargain within the structure set out in article 5 of its constitution in this jurisdiction, there is a possibility, that the parties might be faced with procedural difficulties as they attempt to negotiate a first agreement. While the Board is concerned that article 5 of the applicant’s constitution may give rise to bargaining difficulties in this jurisdiction, it is of the view that this possibility does not undermine the applicant’s status as a trade union and is best left as a matter related to the collective bargaining which will ensue between the parties. The respondent chose not to make representations on this point.

10. Having regard to the agreement of the parties the Board finds that all professional soccer players either on loan or otherwise employed by Prosoccer Limited in Metropolitan Toronto, including players on the following eligibility lists: active, temporarily inactive, disabled, suspended, ineligible and military save and except Assistant Coach and those above the position of Assistant Coach, constitute a unit of employees of the respondent appropriate for collective bargaining.

11. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on April 12, 1979, the terminal date fixed for this application and the date which the Board determines under section 92(2)(j) of The Labour Relations Act to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

12. A certificate will issue to the applicant.

1880-78-U Graphic Arts International Union, Local 35-P, (Complainant), v. **Toronto Star Newspapers Limited**, Printing and Graphic Communications Union No. N-1, (Respondents).

Bargaining Rights – Duty to Bargain in Good Faith – Jurisdictional Dispute – Whether demand to amend scope of established bargaining rights is bargaining in bad faith – whether work jurisdiction and bargaining rights are synonymous – claim of work jurisdiction properly asserted by section 81 application

BEFORE: Donald D. Carter, Chairman, and Board Members H.J.F. Ade and O. Hodges.

APPEARANCES: *Harold F. Caley and Robert Rusk for the complainant; Derek L. Rogers, C. J. Davies, P. Dawson and J. Seymour for Toronto Star Newspapers Limited; Alick Ryder and Dennis Moore for Printing and Graphic Communications Union No. N-1.*

DECISION OF THE BOARD; May 3, 1979

1. This is a complaint brought under section 79 of *The Labour Relations Act* alleging a violation of sections 3, 14, 35, 41, 56, 58 and 59 of the Act and seeking an order restraining the respondents from engaging in conduct that would be in contravention of these provisions.

2. The complaint arises out of the negotiations now taking place between the respondent employer (the Star) and, on the other side, the applicant union (Local 35-P) and the respondent union (Local 1). The negotiations between the Star and Local 35-P began officially when the Star was served with notice to bargain on September 15, 1978. At that time Local 35-P was a member of a council of unions representing Star employees of which the respondent, Local 1, was also a member. This council, although not certified under the Act, provided a vehicle for the member unions to formulate certain proposals on matters of common interest such as wages. Under this format, however, each union still formulated proposals of special interest to its own members, and presented these proposals to the employer on an individual basis.

3. The common proposals for Local 35-P, Local 1, and one other union, were presented to the Star at a meeting on December 1, 1978. The spokesman for the union at the time was Robert Rusk, the president of Local 35-P. After receiving these proposals, the Star

took the position that it would not reply until it had received the uncommon proposals from each of the three unions. Dates for separate meetings were then arranged by the Star and the unions.

4. The meeting between Local 35-P and the Star was held on December 14, 1978, at which time proposals were exchanged. The Star in its proposal raised four items – elimination or modification of the attrition provision relating to new technology; vacations, bereavement; wage and duration. No reference was made in these proposals to Local 35-P's work jurisdiction, and negotiations appeared to be proceeding smoothly.

5. A meeting between the three unions and the Star on January 12, 1979, was equally uneventful. The bargaining climate began to change, however, at the next meeting of the Star and the three unions on January 23rd when the Star indicated for the first time in the negotiations its desire to have a single plate-making department for reasons of efficiency. It is evident that this desire for greater efficiency led the Star to make what it called "offers of settlement" to both Local 35-P and Local 1 at the next meeting on February 2nd. Both offers contained a provision that "the assignment of jurisdiction over new equipment and/or new processes (including the processes and equipment involved in the making of direct printing plates) shall be at the sole discretion of the employer". The offer to Local 35-P contained a further provision relating to that union's jurisdiction:

"Should the employer assign jurisdiction of direct printing plate making to a union other than the Graphic Arts International Union No. 35, G.A.I.U. including the making of negatives and any stripping of negatives, the terms Article 2, Section 2 of the main collective agreement may be declared null and void by the Employer which shall have the sole discretionary right to re-assign this work in whatever manner it deems appropriate for the efficient operation of its business."

6. The impact of this latter provision upon Local 35-P can only be understood by examining certain provisions of its agreement that expired on December 31, 1978. These sections read:

ARTICLE 1

SECTION 1. The employer hereby recognizes Graphic Arts International Union No. 35-P, G.A.I.U. as the exclusive bargaining agent of all employees engaged in the process of photo-engraving and its attendant work in the production of the Employer's publications as defined in Article 2, Section 2 hereunder, the said employees forming a group who are and have for many decades been members of a craft and Graphic Arts International Union No. 35-P, being a trade union pertaining to such craft.

ARTICLE 2

SECTION 1. Except as hereinafter provided, none but members of the Union in good standing shall be employed to do any work which comes under the jurisdiction of the G.A.I.U. This provision includes Superintendents and Foremen but only bonafide non-working Superintendents shall not

come within the context of this agreement as long as they remain as such. No member of the Union shall be required to handle work which emanates from offices where an authorized legal strike of the G.A.I.U. exists, or to cross a picket line in instances where a strike has been authorized by the G.A.I.U.

SECTION 2. The parties to this agreement have, at the date of this agreement, agreed upon a definition of the operation now included in the process of photo-engraving in the Employer's operations. The process of photo-engraving and its attendant work is defined as being and is the operation in the following processes; in the letter-press process the operations pertaining to the production of photo-engraving from copy, original or subject up to the finished product; in the offset, gravure and other kindred processes all operations from the copy, original or subject up to the finished product ready for the press including, but without limiting the generality of the foregoing, Photography, Retouching, Stripping, Printing, Etching, Finishing, Engraving, Electronic Plate-making, Ben Day (Tint Laying), Proofing and Marking of Proofs for Color Corrections, Routing, Blocking, Making of Masks for Color Separations and for Drop Out Purposes on Plates or Negatives and Making of Blue, Silver or Velox Prints and, more specifically, in Rotogravure the process includes, but without limiting the generality of the foregoing, such operations: (1) Photography; (2) Etching, Staging, Sentizing, Carbon Printing, Marking of Proofs for Color Corrections; (3) Retouching, Rotogravure Layout; (4) Cylinder Grinding, Polishing, Plating, Depositing; (5) Engraving.

7. The three unions, after receiving this offer, then caucused to discuss their bargaining strategy. It was agreed that the Star should be informed that the unions were not prepared to proceed any further that day, and that the three unions would meet later. That later meeting took place on February 7th in the office of Dennis Moore, the president of Local 1. No consensus on a common approach was reached at that meeting. Local 35-P took the position that they should ignore the Star's proposal on jurisdiction, which they considered had the effect of driving a wedge between the two unions, and continue to bargain as a council. The position of Local 1 was that, since jurisdiction had been tabled, it should go for all of it. The two unions did agree, however, that they would have to meet with the Star separately, but that they would not apply for conciliation until the following Monday. It should be noted that the application for conciliation was made by the Star, and not the unions, on February 15th.

8. At this stage of the negotiations, Local 35-P had taken the position that any deletion of the jurisdiction was not negotiable. In its view, the problem of a conflict of jurisdiction between it and Local 1 over the introduction of direct plastic printing plates had been worked out in the previous round of bargaining. A supplemental agreement forming part of the previous agreement contained the following provisions:

(A) Subsection (B) and (C) of this clause constitute the assignment of jurisdiction to the Union over the process of making Napp plastic pattern plates (or other plastic pattern plates which are processed and used in a like manner) and Napp direct plastic printing plates (or other direct plastic printing plates processed and used in a like manner) only.

(B) With respect to Napp plastic pattern plates (other other plastic pattern plates which are processed and used in a like manner) letterpress photoengraving work shall consist of the making of negatives through to completion of the pattern plate.

(C) With respect to Napp direct plastic printing plates (or other direct plastic printing plates processed and used in a like manner) letterpress photoengraving work shall consist of making of negatives and any stripping of the negatives which may be required in the processing of such printing plates but shall not include printing frame exposure of negatives to plate, washout or development and the preparation of such plate for attachment to the press.

Moreover, the previous collective agreement with Local 1 also contained a supplemental agreement relating to the use of direct plastic plates. It provided:

- A) Subsection (B) of this clause constitutes the assignment of jurisdiction to the Union over the processing of Napp direct plastic printing plates (or other direct plastic printing plates processed and used in a like manner) only.
- B) When Napp direct plastic printing plates (or other direct plastic printing plates processed and used in a like manner) are to be used as press plates, Stereotyping work shall consist of processing such plates from printing frame exposure of negatives to plates, washout or development, and the preparation of such plates for attachment to the press, but shall not include the making or stripping of the negatives.

Following the introduction of the Napp direct plastic printing plate in accordance with the terms of this agreement, it is understood and agreed that:

- a) The number of Sterotypers required and the manner of their work assignment shall be at the sole discretion of the Employer.
- b) Members of the workforce may be assigned to work functions other than plate-making if not required for plate-making for the entirety of a shift, provided
 - (i) such other work functions are not in conflict with the terms of a collective agreement between the Employer and a union other than the I.P. & G.C.U.,

and

- (ii) provided such assignment does not cause loss of regular employment for employees in the departments where such temporary assignment has taken place, and provided that a Sterotyper who is assigned in this manner may not be used as part of any manpower

requirement provided in any other agreement between the Union and the Employer,

and

- (iii) it is understood that such temporary work assignments are permitted and would normally take place in departments in which the Union is certified to represent the employees.

The net effect of the previous agreements was to give the photography and stripping functions of plate preparation to Local 35-P, while giving the etching function to Local 1. The Star's offers of settlement in this round of negotiations, in Local 35-P's views, gave rise to the possibility of the transfer of all of its work jurisdiction to the stereotypers, and ensuing redundancy for its members, when the Star made the change to the direct plate process. This apprehension appeared to rest upon Local 35-P's assessment of its own bargaining strength relative to that of Local 1. Local 35-P represented 27 photoengravers employed by the Star while Local 1 represented, not only 37 stereotypers, but also pressmen and paper-handlers bringing its membership at the Star to 300. It was these concerns that gave rise to the filing of this application on February 14th by Local 35-P.

9. Counsel for the complainant argued that the conduct of the two respondents amounted to an interference with the bargaining rights of the complainant. According to counsel, the bargaining position assumed by the Star would have the effect of leaving it free to cut down Local 35-P's representation rights by assigning the work performed by its members to other employees represented by another union. The respondent union, moreover, by indicating that it would claim all of Local 35-P's work jurisdiction would also be interfering with the bargaining rights of Local 35-P. Such an encroachment upon its bargaining rights would not only be inconsistent with the scheme of the Act as set out in sections 3, 35, 41, but would also amount to a direct contravention of sections 56, 58, 59 of the Act. The Star's bargaining position, accordingly, amounted to a failure to bargain in good faith in breach of section 14 of the Act since it amounted to both a refusal to recognize the union and a demand that would give rise to illegal conduct. According to counsel for the complainant, the Star had wrongfully placed on the bargaining table the issue of the very survival of Local 35-P as a bargaining agent at the Star.

10. This case is not an easy one for the Board to resolve. There is no doubt that an employer cannot use its economic leverage to wipe out established bargaining rights. See *United Brotherhood of Carpenters and Joiners of America*, [1978] OLRB Aug. 776. While it is permissible for the parties to negotiate the description of the bargaining unit, the strike or lock-out power cannot be used to either augment or erode established bargaining rights. Bargaining demands having such effect, therefore, must be removed from the bargaining table once a strike or lock-out is imminent or in progress. The question, however, is whether the Star's proposal amounts to a derogation of the bargaining rights of Local 35-P.

11. It is evident that the arguments of Local 35-P rest firmly on the assumption that bargaining rights and work jurisdiction can be equated. Since the Star's offer creates the potential for a reduction of Local 35-P's work jurisdiction, that union concludes that there would be a corresponding reduction in its bargaining rights. As a general rule, however, there is no exact equation between bargaining rights and work jurisdiction. As the Board

stated in *Metropolitan Toronto Apartment Builders Association*, [1978] OLRB Nov. 1022, at p. 1034:

“Nor can it be said that the subcontracting clause interferes with another union’s bargaining rights contrary to section 56 and 59 of the Act. In the Board’s view, there is no exact equation between bargaining rights and work jurisdiction, as the complainant attempted to make out. While the Board recognizes that, without a supporting work jurisdiction, bargaining rights in the construction industry may wither, the two concepts are not congruent. Under *The Labour Relations Act*, bargaining rights acquired either through the certification process or by voluntary recognition only entitle a union to be recognized as the exclusive bargaining agent for a particular group of employees. The bargaining rights conferred by law do not give a union any particular work jurisdiction, and any claim to a work jurisdiction must be asserted and established in the bargaining process through such means as a sub-contracting provision. Sections 56 and 59 of the Act are intended to protect bargaining rights only, and these sections cannot be interpreted as providing protection to a work jurisdiction. Conflicting claims to particular work receive much different legislative treatment, being subject to the procedure established in section 81 of the Act for the resolution of jurisdictional disputes.”

12. While the Board recognizes that bargaining units are often defined in terms of certain job classifications or work categories, these descriptions do not mean that the bargaining agent has an absolute right to the work being performed by the group of employees falling within such job classifications. The reference to work categories in the bargaining unit descriptions, although serving to identify the employees falling within the bargaining unit, does not by itself create an unqualified entitlement to that work. The fact is that some other bargaining agent may also have bargaining rights for other employees of that same employer that are defined in terms of different work categories, and some of the work performed by the employees falling within these work categories may overlap to some degree that of the other group of employees. Job categories are not watertight and, in fact, there may be considerable leakage between categories, giving rise to competing claims for work from bargaining agents. This sort of problem, as a general rule, is not treated as one involving representation rights of the competing bargaining agents but as a dispute over work jurisdiction. The Act contemplates that such competing claims to work are to be resolved through the jurisdictional dispute procedures set out in section 81.

13. In the instant case, the bargaining rights of Local 35-P are defined in terms of all employees engaged in “the process of photo-engraving and its attendant work in the production of the Employer’s publications as defined in Article 2, Section 2, hereunder, the said employees forming a group who are and have for many decades been members of a craft and Graphic Arts International Union, No. 35-P, being a trade union pertaining to such craft.” In the Board’s view, this description serves to define the bargaining rights in terms of those employees of the Star who perform certain work as members of the photoengraver’s craft. It is this group of employees for which the complainant holds bargaining rights and Local 35-P enjoys the exclusive right to bargain with the Star on behalf of these employees. Any refusal by the Star to bargain with Local 35-P in respect of these employees, or any attempt by Local 1 to bargain on behalf of these employees, would be illegal.

14. The complaint, however, is not based on any such refusal or interference, but upon the Star's proposal that the assignment of the work now performed by Local 35-P be at the employer's discretion, and the stated intention of Local 1 to claim all of this work. What we have before us is a latent jurisdictional dispute. The Star's proposal has the obvious effect of eliminating the demarcation line between the two unions that was established in the previous round of bargaining, and creating the possibility that some different work assignment might be made under the new collective agreement. Such a change, however, has not occurred, and the Star's proposal, in fact, leaves open the possibility that it might not occur. As a result, the Board ruled in its decision on the related complaint under section 81, Board File No. 1881-78-JD, that although there might exist the potential of jurisdictional conflict, there was not at this stage the type of jurisdictional conflict contemplated by section 81.

15. The Board is convinced that this complaint is nothing more than a latent jurisdictional dispute. It is clear to us that the complainant, by framing its argument in terms of a derogation of bargaining rights, is attempting to assert an absolute claim to the work in question. If the Board were to grant the remedy requested by the complainant, it would have the effect of preventing the respondent union from making any claim to the work in question. Even if Local 35-P has the better claim to the work in question, and we make no finding in this regard, such a claim should be asserted through the jurisdictional dispute provisions under section 81 of the Act, and not by means of an unfair labour practice complaint.

16. Our conclusion that this matter has not yet ripened into a jurisdictional dispute, however, does not mean that the Star and Local 1 may use the negotiation process to weaken Local 35-P's claim to the work in question. Local 35-P is entitled under section 81 of the Act to have its claim to the work in question dealt with on its merits. Accordingly, any attempt to circumvent the jurisdictional dispute procedures of the Act by either the Star or Local 1 in their bargaining would be inconsistent with the Act, and would amount to a breach of the duty to bargain in good faith. The facts before us, however, do not establish that either of the respondents is attempting to circumvent the jurisdictional dispute procedures under the Act. The Star is merely attempting to bargain for a discretion to assign the work in question, and Local 1 is merely asserting its own claim to such work. Even if the Star were to be successful in establishing a discretion to assign the work, and Local 1 were to continue to maintain its claim to the work, these eventualities would not affect the merits of Local 35-P's case under section 81 if a jurisdictional dispute were to materialize.

17. Accordingly, for the reasons given above, this complaint is dismissed.

1978-78-M John W. Spellman, Applicant, v. The University of Windsor Faculty Association, Respondent Trade Union, v. **University of Windsor**, Respondent Employer.

Religious Objectors – whether objection to payment of union dues based on sincerely held religious beliefs

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members W. F. Rutherford and E. C. Went.

APPEARANCES: *W. R. Herridge, Q.C., John W. Spellman, and G. Vandezande for the applicant; G. Charney, C. Ansley and M. Pardhan for the respondent trade union and Gary D. T. Wintermute for the respondent employer.*

DECISION OF THE BOARD; May 10, 1979

1. The name "The Faculty Association" appearing in the style of cause of this application as the name of the respondent trade union is amended to read: "The University of Windsor Faculty Association"; and the name "The University of Windsor" appearing in the style of cause of this application as the name of the respondent employer is amended to read: "University of Windsor".
2. The applicant is seeking exemption under section 39(1)(b) of The Labour Relations Act from the obligation to pay dues to The University of Windsor Faculty Association ("the Association") under the terms of its collective agreement with The Board of Governors of the University of Windsor ("the employer"). The applicant states that his objection is founded in his religious beliefs and would apply equally to joining the Association or to paying dues to it, however, the collective agreement does not require membership as a condition of employment.
3. The applicant has been continuously employed by the employer since July 1, 1967. The collective agreement was signed November 2, 1977 and is the first one entered into by the Association and the employer. Therefore the application is timely with the requirements of section 39(2)(a) of the Act.
4. At all times material to this application, the applicant was head of the Department of Asian Studies ("the Department") of the University of Windsor, a position falling within the scope of bargaining unit described in the collective agreement. He received the degree of Doctor of Philosophy (Indian History), with distinction, from the University of London (School of Oriental and African Studies). The applicant states that his religious beliefs which are the grounds for seeking section 39 exemption are:
 - (a) the religious principle of 'right livelihood';
 - (b) the religious belief that all results are determined by God; and
 - (c) the religious belief that one's duty is to do one's duty without concern for rewards or benefits.

He enlarged on these beliefs to explain that they are founded in the Hindu religion which he espouses. These beliefs are his personal concept of duty and they transcend all other matters. He teaches because he sees it as his duty, it is a calling in which he believes and any material rewards deriving from its pursuit are unimportant. In Hinduism terms, this concept of duty is his personal Dharma. Dharma is harmony, therefore he must do his duty in harmony with his universe. It would be a violation of his Dharma if he were to focus on the material rewards of teaching.

5. The applicant objects to being a participant in the Association because it offends his religious beliefs. He views the payment of dues, whether or not he was a member of the Association, as making him a participant in it. He maintains that the Association is committed to the attainment of material benefits for its members and that is not why he teaches. Furthermore, if the Association were to strike in support of its aims and objectives, it would be a violation of his religious principles to participate in or support the withdrawal of services to students, which would result from a strike. Moreover a strike would be offensive to his religious beliefs because of its inherently coercive nature; he disagrees with coercive efforts to promote the interests of individuals or groups because coercive efforts promote disharmony, thus he embraces the peaceful approach of the late Mr. Ghandi. While these beliefs are based on significant tenets of Hinduism, the applicant is not a member of that faith. In fact, in 1964 he made a conscious decision not to convert to Hinduism, having undergone formal preparation to do so. His evidence is that he is neither a member of nor has any formal ties with any organized religion, but he attends many churches. It was the requirement of Hinduism that he forsake all other religions which led to his decision not to convert.

6. The applicant first learned in September 1976 that the Association might become the bargaining agent for academic staff. His fears of what effect this might have on his teaching, which he expressed to his department staff, led him to refer to The Labour Relations Act and the realization that his religious beliefs might exempt him from membership. Starting about the same time and continuing until the instant application was filed, the applicant initiated a variety of actions with respect to his staff and the administration of the Department. The nature of these actions was such that they resulted in confrontations between him, his staff and the University administration. The Board heard lengthy and detailed testimony on these events, and has carefully reviewed and considered this evidence. Without making detailed findings of fact thereon, the Board does not find that the events taken on the whole readily may be characterized as strong signs of substantial disharmony between the applicant and his staff and some members of the Administration.

7. There is also uncontradicted evidence from the trade union respondent that the applicant was generally opposed to trade unions, although the applicant denies the respondent's allegation that, over a lengthy period of time well prior to the Association's application for certification, he never linked his opposition to his religious beliefs. Nor does the applicant dispute the respondent's evidence that he sought the direct intervention of his staff in successfully appealing in 1974 the withholding of his annual increment.

8. In order to be eligible for an exemption under section 39 of the Act, the applicant must convince the Board that his objection to paying dues to the Association is based on his religious beliefs. The Board, in its decision in *Mrs. Helena Wybenga*, [1976] OLRB Rep. Aug. 422, sets out in paragraph 4 and 5 the subjective test and principles which are to be ap-

plied in deciding this type of application and concludes that the appropriate questions for the Board to ask itself about the applicant's beliefs are the following:

- (a) are they sincerely held;
- (b) are they religious; and
- (c) are they the cause of the objection to paying union dues.

9. There is no doubt that the applicant's beliefs are religious, a conclusion with which the trade union respondent agrees. The Board, however, having assessed the evidence and the demeanor of the witnesses, finds that the applicant has failed to establish that his objections to trade unions is motivated by his religious beliefs. Rather it appears to the Board to be a case where the applicant has rationalized his general objections to trade unions in terms of his religious beliefs.

10. For these reasons, the Board is not satisfied that it is because of the applicant's religious beliefs that he objects to the payment of dues or other assessments to the Association. The application is dismissed.

1302-77-U 1308-77-U 1987-77-U Rachelle Richards, (Complainant), v. Christian Labour Association of Canada, (Respondent), v. **Vision '74 Nursing Home**, (Intervener).

Duty of Fair Representation – Trade Union – Refusal to refer grievance to arbitration – Grievor brought earlier allegations of misconduct against union officials participating in decision – reasonable apprehension of bias not section 60 test – refusal to proceed to arbitration reasonable

BEFORE: Arthur Haladner, Vice-Chairman and Board Members J. D. Bell and O. Hodges

APPEARANCES: *Ted Wohl for the complainant; W. R. Herridge, Q.C. and C. Vanderlaan for the respondent; Robert G. Murray for the intervener respondent.*

DECISION OF THE BOARD; May 14, 1979

1. These are two complaints brought under section 79 of the Act. The first alleges that Rachelle Richards was discharged by the employer for her union activities on behalf of London and District Service Workers Union, Local 220. The second alleges that the Christian Labour Association of Canada breached its duty of fair representation in failing to take her grievance to arbitration.

• • •

[the facts relating to the complaint against the employer are omitted]

5. Accordingly, the complaint against the employer is dismissed.

6. Dealing now with Mrs. Richards' complaint against the trade union – the complainant alleges that she was dealt with by the Christian Labour Association of Canada (CLAC) in a manner contrary to the requirements of section 60 because of her support for Local 220, which was then seeking to displace CLAC as the bargaining agent for the unit of which she was a member. The complainant alleges that CLAC's director, John Vanderlaan, failed to advise her of a grievance meeting, which took place on November 9th, and that he subsequently informed her that his representation (of her) would be minimal. On December 15th, the union convened a meeting at which it was decided that the complainant's grievance should not be taken to arbitration. The vote of the union executive, which was by secret ballot, was five votes against proceeding to arbitration and no votes for. The complainant was advised of, and attended, the meeting of December 15th. She alleges, however, that she was not told of the purpose of that meeting until after it was over. Further, the complainant alleges that the December 15th meeting failed to deal in any way with the alleged culminating incident with respect to her discharge, and that one of the four stewards who participated in the meeting, and who voted against her taking her grievance to arbitration, was the object of allegations previously made by her, allegations which were part of the reason for her discharge. The complainant alleges that another steward was involved in the incident regarding the changing of shifts. Counsel for the complainant contends that the union stewards acted in an improper manner in failing to disqualify themselves from participating in the meeting and the vote. Counsel relies on the *IGA Food Line* case, 63 CLLC, 745.

7. On the evidence before it, the Board finds that the complainant was advised of the grievance meeting which she did not attend; that she was aware of the purpose of the December 15th meeting from the outset; and that she was given a full opportunity to make representations. The Board finds that Vanderlaan did discuss the importance of finding a culminating incident and that the discussion was not restricted to the incidents set out in the October 7th letter. The Board finds that Vanderlaan did not tell the complainant that his representation would be minimal, and there is no evidence to suggest that it was. It was admitted that Vanderlaan vigorously put forward her case against the employer. The Board finds that despite his natural and admitted concern regarding her actions on behalf of Local 220, Vanderlaan dealt with the complainant's grievance in a fair and proper manner.

8. There is no requirement under the Act that union officials who participate in the decision as to whether a particular grievance should be taken to arbitration must be "unbiased" in the sense required of a judge or a tribunal, which is required to act judicially. On the contrary, the legislation contemplates that the grievances of employees will be examined by individuals who are familiar with the grievor and his work record and are thus able to realistically assess the merits of the grievance and its prospects for success at arbitration. In the section 60 context, a "reasonable apprehension of bias" is not the test. There must be evidence from which it can reasonably be inferred that the employee was, in fact, the victim of bad faith or discrimination.

9. It is clear that the two stewards, neither of whom were known to Vanderlaan to have been involved in the incidents in question, were not selected in an effort to "tip the scale" against the complainant. In the Board's view, Johnson's involvement, which was minimal, and which did not involve a conflict with the complainant, cannot reasonably be regarded as a source of concern. The Board finds that it was entirely proper for Johnson to have participated in the meeting of December 15th and the vote, and that she did not act in

an arbitrary, bad faith or discriminatory fashion. We do consider that it would have been more prudent for Ellenor to have refrained from participating in the decision making process since she was the RNA accused by the complainant of giving liquor to an aide. However, Ellenor gave evidence, which the Board accepts, that she bore no ill feeling toward the complainant. The Board finds that Ellenor did not act in an arbitrary, discriminatory or bad faith manner in deciding to vote against the complainant's grievance proceeding to arbitration. (It should be noted that prior to the vote being held, the complainant voiced no objection to Ellenor participating.) In any event, it is clear that her participation did not affect the outcome. The evidence indicates that Ellenor did not discuss the alleged liquor incident with the other members of the executive. Nor did she make her decision on the grievance known. As stated, the vote, which was by secret ballot, was five to nothing in favour of not taking the complainant's grievance to arbitration.

10. The Board would add that the complainant's grievance was not a grievance which could have been regarded by the union as particularly meritorious. On the information available to it, the union could only have concluded that the grievance lacked merit, and would, given the complainant's past record, be unlikely to succeed at arbitration. That being the case, a decision not to proceed to arbitration appears reasonable and in accord with the legitimate interests of the union. (See: *Antonio Melillo*, [1976] OLRB Rep. Oct. 613 for a discussion of the reasons for allowing trade unions the discretion to decide whether a particular grievance should be taken to arbitration.)

11. For the reasons stated the Board finds that the complaint against the union should also be dismissed.

0838-78-R Ontario Public Service Employees Union, (Applicant), v. Windsor Western Hospital Centre Inc., (Respondent), Group of Employees, (Objectors).

Appropriateness – Bargaining Unit – Certification – Employees objecting to inclusion in bargaining unit agreed to by Union and Employer – objectors claiming professional status sets them apart from others in unit – whether exclusion appropriate

BEFORE: Rory F. Egan, Alternate Chairman, and Board Members M. J. Fenwick and W. Gibson.

APPEARANCES: *Pauline R. Anidjar for the applicant; W. L. McGregor, Q.C. for the respondent; Joseph John Comartin for the objectors.*

DECISION OF THE BOARD; May 11, 1979

1. This is an application for certification in which the applicant and the respondent agreed upon the following bargaining unit as appropriate for certification:

All paramedical employees of Windsor Western Hospital Centre, Inc.

in Windsor, Ontario save and except: Professional Medical Staff, Dept. Heads, Chiefs, Assistant Chiefs, Directors, Assistant Directors, Supervisors and those above the rank of Supervisors, Interns and Students and Employees covered by subsisting collective agreements.

For the sake of clarity, the expression "paramedicals" includes both Registered and Graduate: Audiologists, Cardiopulmonary Technologists, Child Care Workers, Child Care Assistants, Counsellors, Therapeutic Dietitians, Occupational Therapists, Occupational Therapy Assistants (Certified), Pharmacists, Pharmacy Assistants (Certified), Physiotherapists, *Psychologists*, *Psychometrists*, Recreational Therapists, Remedial Gymnasts, Respiratory Technologists, Social Workers, Social Work Assistants, Speech Therapists.

2. A group of employees objected to the inclusion in the bargaining unit of psychologists and psychometrists and sought their exclusion on the grounds that persons in these categories do not share a community of interest with the other persons in the bargaining unit set out above.
3. The Board appointed a Labour Relations Officer to inquire into and report to the Board on the matters in dispute. In due course, the Board heard the representations of the parties as to the conclusions they wished the Board to draw from the evidence contained in the report.
4. The evidence in the report indicates that a full examination of all aspects of the nature, functions and qualifications of psychologists and psychometrists was made during the examination by the officer with the assistance of counsel for the parties.
5. The Board is grateful for having had the benefit of the full and able argument made by Mr. Comartin for the objectors. The main thrust of the argument involves an attempt to distinguish the present case from what the Board and those engaged in labour relations, particularly in the hospital field, recognize as the Board's answer to the long-vexed question of hospital bargaining units, that is, the *Stratford General Hospital* case, [1976] OLRB Rep. Sept. 459.
6. The objectors argued that notwithstanding the inclusion of the objectors' classifications in the para-medical group in the *Stratford* case, the evidence in the present case would indicate a lack of community of interest between them and the remainder of the proposed bargaining unit. It was argued that the community of interest of the objectors was so pronounced that it ought to overcome any aversion that the Board has expressed to fragmentation in hospital bargaining units. In this respect, it was urged that the Board should take note of trends which indicate that psychology is moving more and more towards providing primary separate service.
7. It was also suggested that regard should be had for the alleged fact that the community views the work and status of the objectors as putting them above their co-workers.
8. The objectors also pointed out that they have a professional and ethical responsibility substantially different from others in the proposed unit in that they are governed by

the Ontario Board of Examiners in matters of discipline and ethics. This applies to the psychologists in particular. It was urged that by including these categories in the same bargaining unit as others there would be imposed an additional responsibility with which the union would have to deal.

9. At the basis of the submission really is the argument that the objectors are members of a profession whose contact with the other persons in the proposed unit is not great and whose practice is tending toward more professionalism, which in turn strengthens the community of interest as between the objectors' two categories while at the same time it tends to weaken any community of interest with the other classifications that may have been seen earlier, and before the advanced status now said to be enjoyed had been realized.

10. The objectors made it clear that they were not claiming that their professionalism and lack of interest with the other classifications meant that they were rejecting the idea of unionization but that they felt they ought to be separately represented.

11. The arguments raised by the objectors are similar to those with which the Board dealt in the *Stratford Hospital* case (supra), although it would appear that the evidence presented before us on the question of professionalism had more depth than that before the *Stratford* panel and tends to show a primary responsibility developing in the use made of the categories in dispute together with a heightening of professional consciousness and of increased comparative status. We are of the view, however, that even if it be conceded that there has been a change or advancement in the role and status of the objectors' categories since the *Stratford Hospital* case (supra), it is not of such significance as to persuade the Board to depart from the reasoning, and principles based thereon, set out in the *Stratford* decision so as to allow the exclusion of the psychologists and psychometrists from the bargaining unit sought by the applicant and agreed to by the respondent.

12. In the result then the Board finds that the agreed-upon bargaining unit set out in paragraph 1 hereof constitutes a unit of employees of the respondent appropriate for collective bargaining.

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[Results of vote omitted]

16. A certificate will issue to the applicant.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING APRIL 1979

BARGAINING AGENTS CERTIFIED DURING APRIL

No Vote Conducted

1904-77-R: Canadian Union of Public Employees (Applicant) v. Toronto Auto Parks (Airport) Limited (Respondent) v. Group of Employees (Objectors).

Unit #1: "all employees of the respondent at Terminals 1 and 2 at the Toronto International Airport, save and except supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (90 employees in the unit).

Unit #2: "all employees of the respondent regularly employed for not more than twenty-four hours per week and students employed during the school vacation period at Terminals 1 and 2 at the Toronto International Airport, save and except supervisors, persons above the rank of supervisor and office staff." (41 employees in the unit).

0839-78-R: Canadian Union of Public Employees (Applicant) v. Corporation of the Borough of Etobicoke (Respondent).

and

0840-78-R: Canadian Union of Public Employees (Applicant) v. Corporation of the Borough of Etobicoke (Respondent) v. Employee (Objector).

Unit: "all employees of the respondent, save and except those employees covered by the subsisting collective agreement, office, clerical and technical employees, the assistant supervisor in the animal control section of the Clerk's Department and persons above that rank in the Clerk's Department, persons above the rank of senior clerk in the utilities division of the Works Department, supervisors and persons above the rank of supervisor, students employed during the school vacation period and persons regularly employed for not more than twenty-four hours per week." (25 employees in the unit). (*Having regard to the agreement of the parties*).

0928-78-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees Teamsters Local 647 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Humpty Dumpty Foods Ltd. (Respondent).

Unit: "all employees of the Respondent employed in the City of Ottawa, Ontario, save and except supervisors and persons above the rank of supervisor." (19 employees in the unit). (*Having regard to the agreement of the parties*).

1031-78-R: Service Employees International Union, affiliated with the A.F. of L., C.I.O., C.L.C. (Applicant) v. Elm Tree Nursing Home (Respondent).

Unit: "all employees of Elm Tree Nursing Home in Metropolitan Toronto, Ontario, save and except professional medical staff, registered nurses, graduate nurses and undergraduate nurses, physiotherapists, occupational therapists, director of activities, supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (80 employees in the unit).

1277-78-R: International Molders & Allied Workers Union (Applicant) v. Riverdale Frozen Foods Limited (Respondent).

Unit: "all employees of the respondent at Niagara Falls, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and persons regularly employed for not more than 24 hours per week." (90 employees in the unit).

1279-78-R: International Leather Goods, Plastics & Novelty Workers' Union, Local 8 (Applicant) v. Norseman Plastics Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in the municipality of Metropolitan Toronto save and except assistant forepersons, persons above the rank of assistant foreperson, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (97 employees in the unit).

1312-78-R: Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230 affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. D. Crupi and Sons Ltd. (Respondent).

Unit: "all owner-operators of trucks who are dependent contractors employed by the respondent in Stouffville, Ontario." (43 employees in the unit).

1396-78-R: Teamsters Union, Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Western Dispatch Inc. operating as Western Dispatch Company (Respondent).

Unit: "all dependent contractors of the respondent working at or out of Metropolitan Toronto, save and except dispatchers, those above the rank of dispatcher, sales staff and office staff." (23 employees in the unit).

1496-78-R: United Steelworkers of America (Applicant) v. Irving Steel Limited (Respondent) v. Sheet Metal Workers Int. Assoc., Local Union 562 (Intervener).

Unit: "all employees of the respondent at Cambridge, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and persons covered by a subsisting collective agreement between the respondent and the Sheet Metal Workers' International Association, Local 502." (44 employees in the unit). (*Having regard to the agreement of the parties*).

1704-78-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Applicant) v. Crawford Sand and Gravel Co., Superior Sand and Gravel Co. (Respondents).

Unit: "all dump truck owner-operators who provide haulage services to the respondent at Maple, Ontario." (35 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note – see Report of full decision [1979] OLRB Rep. April*).

1752-78-R: Retail Clerks Union, Local 206 Chartered by the Retail Clerks International Union (Applicant) v. Newt Webster Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the Respondent at London, Ontario save and except foremen and persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (21 employees in the unit). (*Having regard to the agreement of the parties*).

1772-78-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.) (Applicant) v. The Ontario Hospital Association (Respondent).

Unit: "all office and clerical employees of the respondent within the Municipality of Metropolitan Toronto, save and except section heads, managers or co-ordinators, persons above the rank of section head, manager and co-ordinator, secretaries to those above the rank of supervisor, audio-visual staff, sales staff, communications staff, print shop staff, mail room clerks regularly assigned to reading mail, internal auditors, consultants, all employees in the Hospital Employee Relations Services Department (Including personnel and payroll staff), all employees of the Investment Services Department, all employees of the Hospital Accident Prevention Department, systems analysts, programmers and all computer operations staff, maintenance engineers, pharmaceutical chemists, students employed during the school vacation periods and persons regularly employed for not more than twenty-four hours or less per week." (497 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note – see Report of full decision [1979] OLRB Rep. April*).

1781-78-R: United Steelworkers of America (Applicant) v. Fotomat Canada Limited (Respondent).

Unit: "all employees of the respondent engaged in retail sales in the City of Oshawa, save and except supervisors and persons above the rank of supervisor." (13 employees in the unit).

- and -

1797-78-R: United Steelworkers of America (Applicant) v. Fotomat Canada Limited (Respondent).

Unit: "all employees of the respondent engaged in retail sales in the township municipality of the Township of Scugog, save and except supervisors and persons above the rank of supervisor." (2 employees in the unit).

- and -

1844-78-R: United Steelworkers of America (Applicant) v. Fotomat Canada Limited (Respondent). (2 employees).

- and -

1845-78-R: United Steelworkers of America (Applicant) v. Fotomat Canada Limited (Respondent). (2 employees).

- and -

1848-78-R: United Steelworkers of America (Applicant) v. Fotomat Canada Limited (Respondent).

Unit: "all employees of the respondent engaged in retail sales in the Town of Newcastle, save and except supervisors and persons above the rank of supervisor." (2 employees in the unit).

- and -

1855-78-R: United Steelworkers of America (Applicant) v. Fotomat Canada Limited (Respondent).

Unit: "all employees of the respondent engaged in retail sales in the municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor." (84 employees in the unit).

1851-78-R: Canadian Transportation Workers Union No. 188, National Council of Canadian Labour (Applicant) v. Laidlaw Transportation Limited (Respondent) v. Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 141 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Intervener).

Unit #1: "all employees of the maintenance department working in or out of the respondent's

garage in the City of Chatham, save and except foremen, persons above the rank of foreman and persons regularly employed for not more than 24 hours per week.” (40 employees in the unit).

Unit #2: “all employees of the maintenance department working in or out of the respondent’s garage in the Town of Exeter, save and except foremen, persons above the rank of foreman and persons regularly employed for not more than 24 hours per week.” (2 employees in the unit).

Unit #3: “all employees of the maintenance department working in or out of the respondent’s garage in the Town of Aberfoyle, save and except foremen, persons above the rank of foreman and persons regularly employed for not more than 24 hours per week.” (employees in the unit).

Unit #4: “all employees of the maintenance department working in or out of the respondent’s garage in Embro, save and except foremen, persons above the rank of foreman and persons regularly employed for not more than 24 hours per week.” (2 employees in the unit).

1857-78-R: The Canadian Union of Public Employees (Applicant) v. The Roman Catholic Children’s Aid Society for The County of Essex (Respondent).

Unit #1: “all employees of the respondent for The County of Essex, save and except supervisors, persons above the rank of supervisor, the secretary to the executive director, the bookkeeper, students employed during the school vacation period, persons employed for not more than twenty-four (24) hours per week, and persons employed in the four Group Homes and one Independent Home.” (44 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity not – see Report of full decision [1979] OLRB Rep. April*).

Unit #2: “all Group and Independent Home employees of the Roman Catholic Children’s Aid Society in The County of Essex working at or out of the homes save and except those regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (employees in the unit). (*Having regard to the agreement of the parties*).

1879-78-R: Federation of Teachers in Hebrew Schools (Applicant) v. Community Hebrew Academy of Toronto (Respondent).

Unit: “all teachers of the respondent in the field of Jewish education, save and except the principal and those above the rank of principal.” (10 employees in the unit).

1906-78-R: The Canadian Union of Public Employees (Applicant) v. The Children’s Aid Society of the District of Thunder Bay (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent in the District of Thunder Bay save and except Local Director, Co-ordinator of Services, Office Manager-Accountant, Senior Workers, Senior Group Home Worker, Supervisors, persons above the rank of Supervisor, Secretary of the Local Director, students employed during school vacation periods or on a cooperative work study program.” (62 employees in the unit). (*Having regard to the agreement of the parties*).

2025-78-R: Labourers’ International Union of North America, Local 837 (Applicant) v P. J. Daly plastering Contracting Ltd. (Respondent) v. Ontario Provincial Conference I.U.B.A.C. (Intervener).

Unit: “all plasterers and plasterers’ apprentices in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in the unit). (*clarity note – see Report of full decision [1979] OLRB Rep. April*).

2039-78-R: Millwrights' Local Union 2309, U. B. of C. & J. of A. (Applicant) v. Arcan Eastern Ltd. (Respondent).

Unit: "all millwrights and millwrights' apprentices in the employ of the respondent in the county of Ontario (except the Townships of Pickering, Rama, Mara and Thorah) and the County of Durham (except the Township of Hope), save and except non-working foremen, and persons above the rank of non-working foreman." (2 employees in the unit).

2045-78-R: Lumber and Sawmill Workers Union, Local 2995, of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. J.H. Normick Inc. (Kirkland Lake Division) (Respondent).

Unit: "all employees, cutters and skidder operators of the respondent engaged in its woods operation in the Township of Blain, in the District of Timiskaming, and those townships immediately adjacent thereto, save and except foremen, persons above the rank of foreman, scalers, office and technical staff." (20 employees in the unit).

2046-78-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Charterways Transportation Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of Charterways Transportation Limited, at Kitchener, Ontario, employed for not more than twenty-four hours per week and students, save and except supervisors and foremen, persons above the rank of supervisor and foreman, office and clerical staff and dispatchers, and persons covered by a subsisting agreement between Charterways Transportation Limited and Charterways Fulltime Highway Drivers." (44 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note* – see Report of full decision [1979] OLRB Rep. April).

2061-78-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Geo. Lanthier & Fils Limitee (Respondent).

Unit: "all employees of the respondent working in or out of Cornwall, save and except route inspectors, persons above the rank of route inspector, storekeeper, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (9 employees in the unit). (*Having regard to the agreement of the parties*).

2066-78-R: Canadian Union of Public Employees (Applicant) v. The Corporation of The Town of Halton Hills (Respondent).

Unit: "all employees of the respondent in its Community Arenas operations, save and except Arena Managers, persons above the rank of Arena Manager, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (55 employees in the unit). (*Having regard to the agreement of the parties*).

2068-78-R: Canadian Union of Restaurants & Related Employees (Applicant) v. Foodcorp Limited carrying on business as Swiss Chalet Bar B.Q. (Respondent).

Unit: "all waitresses, waiters, busboys, kitchen staff and cashiers employed by the Respondent at 1113 Finch Avenue, West, in the City of North York, in the Municipality of Metropolitan Toronto and Province of Ontario, save and except hostesses and persons above the ranks of hostess." (64 employees in the unit). (*Having regard to the agreement of the parties*).

2074-78-R: Hotel, Restaurant Employees Union, Local 743, chartered by Hotel and Restaurant Employees & Bartenders International Union (AFL-CIO-CLC) (Applicant) v. Windsor Raceway Holdings Limited (Respondent).

Unit: "all washroom attendants employed at Windsor Raceway, Windsor, Ontario, save and except foremen, persons above the rank of foremen, students employed during the summer school vacation period and persons regularly employed for not more than twenty-four (24) hours per week." (9 employees in the unit).

2084-78-R: International Union of Operating Engineers, Local 793 (Applicant) v. Rosy Construction Co. Ltd. (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

2085-78-R: International Union of Operating Engineers, Local 793 (Applicant) v. Six Star Construction Ltd. (Respondent).

Unit: "all employees of the respondent in the County of Ontario (except the Townships of Pickering, Rama, Mara and Thorah) and the County of Durham (except the Township of Hope) engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintenance of same, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

2086-78-R: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1403, 1747, 1963, 2480, 2482, 3227 and 3233 (Applicant) v. Steinberg Inc. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Simcoe and the District Municipality of Muskoka, save and except non-working foremen and persons above the rank of non-working foreman." (10 employees in the unit).

2087-78-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 2480, 2482, 3227 and 3233 (Applicant) v. Interras Real Estate Consulting Inc. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

2094-78-R: United Steelworkers of America (Applicant) v. Sudbury Community Legal Clinic (Respondent).

Unit: "all *employees of the Sudbury Community Legal Clinic in Sudbury, save and except Members of the Board and the Area Director." (4 employees in the unit). (**For purposes of clarification attention is drawn to the operation of section 1(3)(a) of the Act*).

2102-78-R: International Union of Operating Engineers, Local 793 (Applicant) v. Winchester Conduits & Structures Limited (Respondent).

Unit: "all employees of the respondent in the County of Grey engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

2103-78-R: Hotels, Clubs, Restaurants, Tavern, Employees, Union, Local 261 Affiliated with A.F.L., C.I.O., C.L.C. (Applicant) v. VS Services Ltd. (Respondent).

Unit: "all employees of the respondent whose employment is directly associated with the servicing of the respondent's vending operations and who work out of its premises in the City of Ottawa, save and except supervisors, persons above the rank of supervisor, office staff, cash room clerks and students employed during the school vacation period." (5 employees in the unit).

2104-78-R: Local Union 636 of the International Brotherhood of Electrical Workers (AFL-CIO-CLC) (Applicant) v. The Corporation of the Town of Milton (Respondent).

Unit: "all employees of the Public Works Department save and except foremen, persons above the rank of foremen, department contractors, office staff, students employed during the school vacation period, and persons regularly employed for not more than twenty-four (24) hours per week." (27 employees in the unit). (*Having regard to the agreement of the parties*).

2106-78-R: Service Employees International Union, Local 532 A.F. of L., C.I.O., C.L.C. (Applicant) v. Hamilton Wentworth Nursing Home (Respondent).

Unit #1: "all employees of the respondent at its nursing home in Hamilton, Ontario, save and except professional nursing staff, physiotherapists, occupational therapists, supervisors, foremen, persons above the rank of supervisor or foreman, office staff, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period." (13 employees in the unit). (*Having regard to the agreement of the parties*). (*Certified*).

Unit #2: "all employees of the respondent at its nursing home in Hamilton, Ontario, who are regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period, save and except professional nursing staff, physiotherapists, occupational therapists, supervisors, foremen, persons above the rank of supervisor or foreman, and office staff." (6 employees in the unit). (*Having regard to the further agreement of the parties*). (*Dismissed*).

2107-78-R: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Harding Carpets Limited (Respondent).

Unit: "all employees of the respondent working in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, general office staff, sales staff, persons employed for not more than twenty-four hours per week and students employed during the school vacation period." (48 employees in the unit). (*Having regard to the agreement of the parties*).

2108-78-R: Federation of Teachers in Hebrew Schools (Applicant) v. Eitz Chaim Schools (Respondent).

Unit: "all teachers employed by Eitz Chaim Schools in the field of Jewish education in Metropolitan Toronto, save and except Principals and those above the rank of Principal, library staff and general studies teachers." (28 employees in the unit). (*Having regard to the agreement of the parties*).

2112-78-R: Federation of Teachers in Hebrew Schools (Applicant) v. Associated Hebrew Schools (Respondent).

Unit: "all teachers employed by Associated Hebrew Schools in the field of Jewish education in Metropolitan Toronto, save and except principals and those above the rank of principal, library staff and general studies teachers." (56 employees in the unit).

2115-78-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the Township of West Carleton (Respondent).

Unit: "all employees of the respondent in West Carleton, save and except road foremen or superintendent, persons above the rank of road foreman or superintendent, office clerical and technical staff and persons regularly employed for not more than 24 hours per week." (21 employees in the unit).

2116-78-R: Canadian Union of Public Employees (Applicant) v. Country Place Nursing Home Limited (Respondent).

Unit: "all employees of the respondent employed as graduate and registered nurses in Richmond Hill." (12 employees in the unit).

2117-78-R: Service Employees Union, Local 204, Affiliated with A.F. of L., C.I.O., C.L.C. (Applicant) v. St. Raphael's Nursing Homes Limited, carrying on business as St. Raphael's Nursing Home (Springhurst) (Respondent).

Unit: "all employees of St. Raphael's Nursing Home in Metropolitan Toronto, save and except professional medical staff, registered nurses, graduate nurses, undergraduate nurses, physiotherapists, occupational therapists, director of activities, supervisor, persons above the rank of supervisor, office staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period, and persons covered by subsisting collective agreements." (12 employees in the unit). (*Having regard to the agreement of the parties*).

2123-78-R: United Steelworkers of America (Applicant) v. Great Lakes Rail Limited (Respondent).

Unit: "all employees of the respondent in Thunder Bay, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and persons covered by the subsisting collective agreement with the Canadian Brotherhood of Railway, Transport and General Workers, Local 32." (15 employees in the unit). (*Having regard for the reply filed by the respondent and the applicant's submissions at the hearing*).

2125-78-R: Canadian Food & Allied Workers, Local 175, chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Applicant) v. Valdi Inc. (Trading as Valdi Discount Foods) (Respondent).

Unit: "all employees of the respondent in its stores in Mississauga, Ontario, save and except the Assistant Store Manager, and persons above the rank of Assistant Store Manager." (8 employees in the unit). (*Having regard to the agreement of the parties*).

2126-78-R: Canadian Union of Public Employees (Applicant) v. The Port Colborne District Association for the Mentally Retarded, Inc. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in the Municipality of Port Colborne save and except Assistant to the Manager of Arc Industries, Residential Supervisors, persons above the rank of Assistant to the Manager of Arc Industries and Residential Supervisors, Residential Secretary/Supervisor and

Parental Relief Coordinator.” (17 employees in the unit). (*Having regard to the agreement of the parties*).

2133-78-R: International Union of Operating Engineers, Local 793 (Applicant) v. D & R Construction (Respondent).

Unit: “all employees of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintenance of same, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit).

2134-78-R: International Union of Operating Engineers, Local 793 (Applicant) v. Roseway Construction Co. Ltd. (Respondent).

Unit: “all employees of the respondent in the Regional Municipality of Niagara and the County of Haldimand engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in the unit).

2138-78-R: Amalgamated Clothing & Textile Workers Union (Applicant) v. Silcofab Limited (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent at its plant in Guelph, Ontario, save and except foremen, foreladies, persons above the rank of foreman and forelady, office, clerical and sales staff, persons employed regularly for not more than twenty-four (24) hours per week and students employed for the summer vacation period.” (82 employees in the unit). (*Having regard to the agreement of the parties*).

2143-78-R: The Carpenters’ District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Amber Custom Furniture Ltd. (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit).

2145-78-R: Office and Professional Employees International Union (Applicant) v. Dayton Employees (Whitby) Credit Union Limited (Respondent).

Unit: “all office and clerical employees of the respondent at Whitby, Ontario, save and except Treasurer Manager and persons above the rank of Treasurer Manager.” (2 employees in the unit).

2151-78-R: Sheet Metal Workers’ International Association, Local Union #540 (Applicant) v. Bavscott Enterprises Ltd. (Respondent).

Unit: “all employees of the respondent in Mississauga, Ontario save and except foremen, those above the rank of foreman, office and clerical staff.” (2 employees in the unit).

2154-78-R: Canadian Brotherhood of Railway Transport & General Workers (Applicant) v. Robert Hunt Corporation (Respondent).

Unit: "all employees of the respondent at 195 Colonnade Road, Ottawa, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, employees regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (6 employees in the unit). (*Having regard to the agreement of the parties*).

2155-78-R: Christian Labour Association of Canada (Applicant) v. Sinteris Canada Inc. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Blenheim, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (18 employees in the unit). (*Having regard to the agreement of the parties*).

2156-78-R: Local Union 2557, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Canwood Lachute, Division of York Transport Equipment Ltd. (Respondent) v. Employee (Objector).

Unit: "all employees of the respondent in Orillia, Ontario save and except foremen and persons above the rank of foreman, office and sales staff." (39 employees in the unit). (*Having regard to the agreement of the parties*).

2161-78-R: International Brotherhood of Painters and Allied Trades Local Union 557, (District Council 46) (Applicant) v. Taurus Painting & Decorating (Respondent).

Unit: "all painters and painters' apprentices in the employ of the respondent in the County of Ontario (except the Townships of Pickering, Rama, Mara, Thorah) and the County of Durham (except the Township of Hope), save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

2166-78-R: Labourers' International Union of North America, Local 183 (Applicant) v. New Tide Investments Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

2167-78-R: Retail Clerks Union, Local 206, Chartered by the Retail Clerks International Union (Applicant) v. Imperial Optical Company Ltd. (Waterloo Branch) (Respondent).

Unit: "all employees of the respondent in Waterloo, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (9 employees in the unit). (*Having regard to the agreement of the parties*).

2173-78-R: Local Union 636 of the International Brotherhood of Electrical Workers (A.F.O.-C.I.O.-C.L.C.) (Applicant) v. The Corporation of the City of Orillia (Respondent).

Unit: "all employees of the Public Works Department of the City of Orillia save and except foremen, persons above the rank of foreman, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and those covered by subsisting collective agreements." (23 employees in the unit). (*Having regard to the agreement of the parties*).

2174-78-R: The International Association of Machinists and Aerospace Workers (Applicant) v. Automotive Fiberglass Manufacturing Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in the Town of Markham, save and except foremen, persons above the rank of foreman, office and sales staff." (42 employees in the unit). (*Having regard to the agreement of the parties*).

2178-78-R: Retail Clerks Union, Local 206 (Applicant) v. Auto Host Car Rentals (Airport Division), Division of Ontario Chrysler (1977) Limited (Respondent).

Unit: "all employees of the Respondent at Mississauga, save and except assistant manager and persons above the rank of assistant manager." (12 employees in the unit). (*Having regard to the agreement of the parties*).

2182-78-R: Local Union 636 International Brotherhood of Electrical Workers, A.F.L.-C.I.O.-C.L.C. (Applicant) v. Southampton Public Utilities Commission (Respondent).

Unit: "all employees of the respondent employed at Southampton, Ontario save and except foremen, those above the rank of foreman and office staff." (5 employees in the unit).

0008-79-R: Teamsters Local Union No. 647, Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. The Becker Milk Company Limited (Respondent).

Unit: "all stationary engineers and mechanics and helpers employed by the respondent in Metropolitan Toronto, save and except supervisor and chief engineer, and those persons above the rank of supervisor and chief engineer." (13 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note* – see Report of full decision [1979] OLRB Rep. April).

0009-79-R: Canadian Union of Public Employees (Applicant) v. Michipicoten District Roman Catholic Separate School Board (Respondent).

Unit #1: "all employees of the respondent employed in its maintenance, caretaking services and plant operation, save and except supervisor, persons above the rank of supervisor, office staff and business administrator." (3 employees in the unit). (*Having regard to the representations of the parties*).

Unit #2: "all employees of the respondent employed in its maintenance, caretaking services and plant operation regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (3 employees in the unit).

0021-79-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 2480, 2482, 3227 and 3233 (Applicant) v. Koopers Hickson Canada Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

0022-79-R: United Brotherhood of Carpenters and Joiners of America – Local Union 93 (Applicant) v. Fleming & Sotramond Corp. Ltd. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

0024-79-R: United Steelworkers of America (Applicant) v. S & S Metals (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent company in Sarnia, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (6 employees in the unit).

0033-79-R: Labourers International Union of North America, Local 607 (Applicant) v. Holscot Construction Ltd. (Respondent).

Unit: "all construction labourers in the employ of the respondent in the District of Thunder Bay, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

0038-79-R: Amalgamated Clothing & Textile Workers (Applicant) v. Greb Industries Limited (Respondent).

Unit: "all employees of the respondent at its plant in Orangeville, Ontario, save and except forelady, persons above the rank of forelady and students temporarily employed during the vacation period." (49 employees in the unit).

0047-79-R: United Brotherhood of Carpenters and Joiners of America, Local Union 38 (Applicant) v. Belgian Art Studios (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0048-79-R: International Association of Bridge, Structural & Ornamental Ironworkers, Local 759 (Applicant) v. Brown Boveri Canada Limited (Respondent).

Unit: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the District of Thunder Bay, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

Applications Certified Subsequent to Pre-Hearing Vote

1319-78-R: International Woodworkers of America (Applicant) v. Malette Wood Products Ltd. (Respondent) v. Lumber and Sawmill Workers' Union, Local 2995 (Intervener).

Unit: "all employees of Malette Wood Products Ltd., Buche Township, Haileybury, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (66 employees in the unit).

Number of names of persons on revised voters' list	60
Number of persons who cast ballots	54
Number of ballots marked in favour of applicant	34
Number of ballots marked against applicant	20

1976-78-R: Canadian Union of Public Employees (Applicant) v. Metropolitan Toronto Association for the Mentally Retarded (Respondent).

Unit #1: "all employees employed by the respondent in Metropolitan Toronto in its Adult Development Program, ARC Industries Program, Employment Training Centres Program, Lorimer Lodge I and II Program save and except Supervisors, persons above the rank of Supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (99 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters list	103
Number of persons who cast ballots	98
Number of ballots marked in favour of applicant	74
Number of ballots marked against applicant	24

Unit #2: "all employees employed for not more than 24 hours per week and students employed during the school vacation period by the respondent in Metropolitan Toronto in its Adult Development Program, ARC Industries Program and Employment Training Centres Program." (10 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	10
Number of persons who cast ballots	3
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	1

1982-78-R: United Electrical, Radio and Machine Workers of America (UE) (Applicant) v. Polybottle (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto save and except forepersons and those above the rank of foreperson, office and sales staff." (162 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	162
Number of persons who cast ballots	147
Number of ballots marked in favour of applicant	100
Number of ballots marked against applicant	47

1993-78-R: Canadian Chemical Workers Union (Applicant) v. Canadian Pittsburg Industries A Division of P.P.G. Industries Canada Limited (Window Plant) London, Ontario (Respondent) v. International Brotherhood of Painters and Allied Trades Local Union 1783 (Intervener).

Unit: "all employees of Canadian Pittsburg Industries, A Division of PPG Industries Canada Limited (London Twindow Plant) at its London Twindow Plant, save and except foreman, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (22 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	14
Number of persons who cast ballots	14
Ballots segregated and not counted	14
Number of ballots marked in favour of applicant	14

2004-78-R: Canadian Union of United Brewery Four, Cereal, Soft Drink and Distillery Workers (Applicant) v. Star Steel Ltd. (Respondent).

Unit: "all employees of the respondent employed at Milton, Ontario, save and except foreman, per-

sons above the rank of foreman, office and sales staff, students employed during the school vacation period and persons employed for twenty-four hours per week or less." (65 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		61
Number of persons who cast ballots		40
Number of ballots marked in favour of applicant	35	
Number of ballots marked against applicant	5	

2043-78-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.) (Applicant) v. Motor Wheel Corporation of Canada Limited (Respondent) v. Canadian Union of Operating Engineers and General Workers (Intervener).

Unit: "all stationary engineers, firemen and helpers employed by Motor Wheel Corporation of Canada Limited engaged in their boiler room at its Chatham plant save and except the manager of engineering." (4 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		4
Number of persons who cast ballots		4
Number of ballots marked in favour of applicant	3	
Number of ballots marked in favour of intervener	1	

2089-78-R: Canadian Transportation Workers Union No. 188 National Council of Canadian Labour (Applicant) v. Superior Sanitation Services, Division of Interflow Systems Limited (Respondent).

Unit: "all employees of the respondent in the maintenance department working in or out of the respondent's terminal, in the City of Kitchener, Regional Municipality of Waterloo, save and except foremen, persons above the rank of foreman, office staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (11 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		10
Number of persons who cast ballots		8
Number of ballots marked in favour of applicant	8	
Number of ballots marked against applicant	0	

Applications Certified Subsequent to Post-Hearing Vote

0746-78-R: Canadian Union of Public Employees (Applicant) v.. The Hamilton and District Association for the Mentally Retarded (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Hamilton, save and except clerical staff, supervisors, persons above the rank of supervisor and persons regularly employed for not more than twenty-four hours per week." (73 employees in the unit).

Number of names of persons on revised voters' list		45
Number of persons who cast ballots		45
Number of ballots marked in favour of applicant	29	
Number of ballots marked against applicant	16	

1683-78-R: Federation of Teachers in Hebrew Schools (Applicant) v. Beth Tikvah Congregational School (Respondent).

Unit: "all teachers of the respondent in the field of Jewish education, save and except the principal, persons above the rank of principal, tutors, Bar Mitzvah teacher and drama teacher." (32 employees in the unit).

Number of names of persons on revised voters' list		23
Number of persons who cast ballots		20
Number of ballots marked in favour of applicant	20	
Number of ballots marked against applicant	0	

1950-78-R: Service Employees International Union, Local 532, A.F. of L., C.I.O., C.L.C. (Applicant) v. St. Magdalene Nursing Home (Respondent).

Unit: "all employees of the respondent in Hamilton regularly employed for not more than that 24 hours per week and students employed during the school vacation period, save and except professional nursing staff, supervisor, foreman, persons above the rank of supervisor or foreman, and office staff." (15 employees in the unit).

Number of names of persons on revised voters' list		11
Number of persons who cast ballots		11
Number of ballots marked in favour of applicant	11	

APPLICATIONS FOR CERTIFICATION DISMISSED

No Vote Conducted

1097-78-R: United Steelworkers of America (Applicant) v. H. Paulin & Co. Limited (Respondent). (201 employees).

1393-78-R: United Brotherhood of Carpenters and Joiners of America – Local Union 93 (Applicant) v. Canac Kitchens Ltd. (Respondent). (3 employees).

1406-78-R: Canadian Union of Public Employees (Applicant) v. District of Algoma Home for the Aged (Algoma Manor) (Respondent) v. Group of Employees (Objectors). (117 employees).

1702-78-R: Canadian Food and Associated Services Union (Applicant) v. Cantor Bakeries (Carousel Franchising Ltd.) (Respondent) v. Group of Employees (Objectors). (44 employees).

1924-78-R: Bayview Villa Nurses' Association (Applicant) v. Villacentres Management Ltd. (Respondent) v. Canadian Union of Public Employees & its Local 1394 (Intervener). (166 employees).

1979-78-R: Teamsters Union Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Intermodal Marine Surveys Ltd. (Respondent). (2 employees).

2027-78-R: Labourers' International Union of North America, Local 506 (Applicant) v. H. MacCallum Contracting Ltd. (Respondent) v. Labourers' International Union of North America, Local 183 (Intervener #1) v. A Council of Trade Unions acting as the representative and agent of Teamsters Local Union 230 and Labourers' International Union of North America, Local 183 (Intervener #2) v. Metro Toronto Sewer & Watermain Association (Intervener #3). (4 employees).

2071-78-R: International Union of Painters and Allied Trades Local Union 1891 (Applicant) v. Rogers Plastering & Drywall Systems (Respondent). (5 employees).

2146-78-R: The Hotel and Club Employees' Union, Local 299 Toronto, Ontario of the Hotel and Restaurant Employees' and Bartenders' International Union (A.F.L.-C.I.O.-C.L.C.) (Applicant) v. Hotel Brampton (Respondent). (35 employees).

Certification Dismissed Subsequent to Pre-Hearing Vote

1573-78-R: The Association of Allied Health Professionals: Ontario (Applicant) v. Scarborough Centenary Hospital Association (Respondent).

Voting Constituency: "All Paramedical employees of Scarborough Centenary Hospital, save and except Supervising Registered Record Librarian, Senior Physiotherapists, Senior Physical Occupational Therapist, Senior Dietitian, Senior E.C.G. Technician, Senior Speech Therapist, Senior Respiratory Technologist, Charge Laboratory Technologists, Senior Services Worker, Division Leaders in Psychiatry, supervisors, persons above the rank of supervisor, students employed on a co-operative training programme and persons covered by subsisting collective agreements." (92 employees).

Number of names of persons on revised voters' list		91
Number of persons who cast ballots		66
Number of ballots marked in favour of applicant	31	
Number of ballots marked against applicant	35	

Certification Dismissed Subsequent to Post-Hearing Vote

1708-77-R: United Brotherhood of Carpenters and Joiners of America (Applicant) v. Canac Kitchens Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at its plant in Thornhill, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (140 employees in the unit).

Number of names of persons on list as originally prepared by employer		109
Number of persons who cast ballots		103
Ballots segregated and not counted	3	
Number of spoiled ballots	2	
Number of ballots marked in favour of applicant	50	
Number of ballots marked against applicant	48	

1230-78-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Applicant) v. Baltimore Air Coil Interamerican Corp. (Respondent) v. Group of Employees (Objectors).

Unit: "all Employees of the respondent at Georgetown, save and except foremen, persons above the rank of foreman, office and sales staff." (46 employees in the unit).

Number of names of persons on list as originally prepared by employer		46
Number of persons who cast ballots		45
Number of ballots marked in favour of applicant	10	
Number of ballots marked against applicant	35	

1749-78-R: International Woodworkers of America (Applicant) v. Heirloom of Canada Limited (Respondent) v. Heirloom of Canada Limited Union (Intervener).

Voting Constituency: "All employees of the respondent at Chesley, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (85 employees).

Number of names of persons on revised voters' list		81
Number of persons who cast ballots		77
Number of ballots marked in favour of applicant	33	
Number of ballots marked in favour of intervener	44	

1896-78-R: The Canadian Union of Public Employees (Applicant) v. The Children's Aid Society of the Districts of Sudbury and Manitoulin (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent within the Districts of Sudbury and Manitoulin, save and except supervisors, persons above the rank of supervisor, Executive Director, Assistant Directors, Coordinators, secretary to the Executive Director, secretaries to the Assistant Directors, chief bookkeeper, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (68 employees in the unit).

Number of names of persons on list as originally prepared by employer		66
Number of persons who cast ballots		61
Number of ballots marked in favour of applicant	22	
Number of ballots marked against applicant	39	

APPLICATIONS FOR CERTIFICATION WITHDRAWN

1858-78-R: In-House Security Association (Applicant) v. Toronto (Harbour Castle) Hilton a Division of Campeau Corporation (Respondent). (12 employees).

2031-78-R: Canadian Union of Public Employees (Applicant) v. Carleton University (Respondent). (900 employees).

2181-78-R: The Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Cooper's Crane Rental Limited (Respondent). (2 employees).

0045-79-R: United Brotherhood of Carpenters and Joiners of America, Local Union 38 (Applicant) v. General Works (Respondent). (4 employees).

0046-79-R: United Brotherhood of Carpenters and Joiners of America, Local Union 38 (Applicant) v. Project Managers (Respondent). (4 employees).

0068-79-R: Office and Professional Employees International Union (Applicant) v. National Union of Provincial Government Employees (Respondent). (5 employees).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1317-78-R: Andre St. Onge (Applicant) v. The International Brotherhood of Painters and Allied Trades, Local 1904, Glazier's Division, Sudbury (Respondent). (*Granted*).

Unit: "all employees working at or out of Sudbury Branch save and except supervisor, office and sales staff." (7 employees in the unit).

Number of names of persons on list as originally prepared by employer		7
Number of persons who cast ballots	7	
Number of ballots marked in favour of Respondent	0	
Number of ballots marked against Respondent	7	

1595-78-R: Samys Tsirbas (Applicant) v. Canadian Food and Allied Workers Local Union 633, Chartered by The Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Respondent) v. Nortown Foods Limited (Intervener). (*Granted*).

Number of names of persons on list as originally prepared by employer		5
Number of persons who cast ballots	7	
Ballots segregated and not counted	2	
Number of ballots marked in favour of respondent	0	
Number of ballots marked against respondent	5	

1736-78-R: Gary Joseph Watson (Applicant) v. Canadian Union of Public Employees and its Local 512 (Respondent) v. The Corporation of the City of Orillia (Employer). (*Granted*).

Unit: "all employees of the Works and Sanitation Department save and except non-working foremen, those above the rank of non-working foreman, and those employees employed in the Municipal Waterworks System and the Municipal Sanitary Sewer System." (23 employees in the unit).

Number of names of persons on list as originally prepared by employer		23
Number of persons who cast ballots	23	
Number of ballots marked in favour of Respondent	1	
Number of ballots marked against Respondent	22	

1789-78-R: Wilfred L. Waller (Applicant) v. United Brotherhood of Carpenters and Joiners of America, Local 3504 (Respondent) v. Wayne A. Assaf and Fashion Craft Kitchens Inc. (Intervener). (15 employees). (*Dismissed*).

1878-78-R: Marcel Arseneault (Applicant) v. Retail Clerks Union, Local 409 (Respondent) v. Notte's Supermarket Ltd. (Intervener). (*Granted*).

Unit: "all employees employed in the store owned and/or operated by Notte's Supermarket Ltd. in the Town of Dryden, in the Province of Ontario, save and except the assistant store manager, and persons above the rank of store manager and office staff." (8 employees in the unit).

Number of names of persons on revised voters' list		8
Number of persons who cast ballots	8	
Number of ballots marked in favour of respondent	0	
Number of ballots marked against respondent	8	

1909-78-R: United Counties of Stormont, Dundas and Glengarry (Applicant) v. Canadian Union of Public Employees (Respondent). (119 employees). (*Dismissed*).

1923-78-R: Howard A. Hansen (Applicant) v. Canadian Union of Operating Engineers & General Workers (Respondent) v. The Cadillac Fairview Corporation Limited (Intervener). (*Granted*).

Unit: "all employees of the Fairview Corporation Limited at 130 Bllor Street West, Toronto, save and except chief engineer, persons above the rank of chief engineer, students employed during school vacation period, and those persons presently covered by a subsisting collective agreement." (2 employees in the unit).

Number of names of persons on list as originally prepared by employer		2
Number of persons who cast ballots		2
Number of ballots marked in favour of Respondent	0	
Number of ballots marked against Respondent	2	

2136-78-R: Cesare Mincone, Artur Martins, and Daniel Morin (Applicants) v. United Brotherhood of Carpenters and Joiners of America, Local Union 446 (Respondent) v. Penwood Properties Limited (Intervener). (3 employees). (*Withdrawn*).

APPLICATIONS FOR DECLARATION OF SUCCESSOR STATUS

2110-78-R: United Electrical, Radio & Machine Workers of America (UE) (Applicant) v. Sunbeam Corporation (Canada) Limited (Respondent). (*Granted*).

2113-78-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) (Applicant) v. Border Tool & Die Limited (Respondent). (*Granted*).

APPLICATIONS FOR CONSENT TO PROSECUTE

0871-77-U: Kernohan Lumber & Sash Co. Limited (improperly named as Kernohan Home Centre Limited) (Applicant) v. Retail Clerks Union, Local 206 (Chartered by The Retail Clerks International Association) (Respondent). (*Withdrawn*).

1130-78-U: Retail Clerks Union, Local 206 chartered by the Retail Clerks International Union (Applicant) v. Kernohan Lumber & Sash Co. Limited (Respondent). (*Withdrawn*).

1131-78-U: Retail Clerks Union, Local 206 chartered by the Retail Clerks International Union (Applicant) v. Kernohan Lumber & Sash Co. Limited (Respondent). (*Withdrawn*).

1507-78-U: International Union of Bricklayers and Allied Craftsmen, Local 2 (Applicant) v. Bricklayers, Masons Independent Union of Canada, Local 1, Bricklayers, Masons Independent Union of Canada Local 1 Welfare Trust Fund and John Meiorin (Respondents). (*Dismissed*).

1550-78-U: Labourers' International Union of North America, Local 506 (Applicant) v. Bricklayers, Masons Independent Union of Canada, Local 1, Bricklayers, Masons Independent Union of Canada, Local 1 Welfare Trust Fund and John Meiorin (Respondents). (*Dismissed*).

COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

0798-77-U: Retail Clerks Union, Local 206 Chartered by the Retail Clerks International Association (Complainant) v. Kernohan Home Centre Limited (Respondent). (*Withdrawn*).

1774-77-U: Nicholas Tarr (Complainant) v. United Brotherhood of Carpenters and Joiners of America, Local Union 2222 (Respondent). (*Dismissed*).

0174-78-U: Hotel and Restaurant Employees' and Bartenders' International Union, Local 412 (Complainant) v. Polish-Canadian Association Club (White Eagle) (Respondent). (*Granted*).

1132-78-U: United Electrical, Radio and Machine Workers of America (UE) (Complainant) v. Wilkinson Foundry, Facings and Supply Co. Limited (Respondent). (*Terminated*).

1133-78-U: United Electrical, Radio and Machine Workers of America (UE) (Complainant) v. Wilkinson Foundry, Facings and Supply Co. Limited (Respondent). (*Terminated*).

1278-78-U: Lois Campbell (Complainant) v. District of Algoma Home for the Aged (Algoma Manor) (Respondent). (*Granted*).

1385-78-U: Nora Dufresne, Ian Day, Doreen McGlashing (Complainants) v. Ted Tsotsos, and Nicholson's Restaurant, Steak House and Tavern (Respondents) v. Eleanor S. Dunn, Business Agent (Intervener). (*Withdrawn*).

1386-78-U: Cathy Smith and Mary Leahy (Complainants) v. Ted Tsotsos, Michelle Leblanc and Nicholson's Restaurant, Steak House and Tavern (Respondents). (*Dismissed*).

1464-78-U: Labourers' International Union of North America, Local 183 (Complainant) v. Finch Paving Company Limited . (Respondent). (*Withdrawn*).

1506-78-U: International Union of Bricklayers and Allied Craftsmen, Local 2 (Complainant) v. Bricklayers, Masons Independent Union of Canada, Local 1, Bricklayers, Masons Independent Union of Canada Local 1 Welfare Trust Fund and John Meiorin (Respondents). (*Dismissed*).

1521-78-U: Mechanical Contractors Association of Ontario (Complainant) v. Foster Wheeler Limited (Respondent). (*Dismissed*).

1545-78-U: Retail Clerks Union, Local 206 chartered by The Retail Clerks International Union (Complainant) v. Kernohan Lumber and Sash Co. Limited (Respondent). (*Withdrawn*).

1551-78-U: Labourers' International Union of North America, Local 506 (Complainant) v. Bricklayers, Masons Independent Union of Canada, Local 1, Bricklayers, Masons Independent Union of Canada, Local 1 Welfare Trust Fund and John Meiorin (Respondents). (*Dismissed*).

1621-78-U: Retail Clerks Union, Local 206 chartered by The Retail Clerks International Union (Complainant) v. Kernohan Lumber & Sash Co. Limited (Respondent). (*Withdrawn*).

1640-78-U: Retail Clerks Union, Local 206 chartered by The Retail Clerks International Union (Complainant) v. Kernohan Lumber & Sash Co. Limited (*Withdrawn*).

1650-78-U: Canadian Food and Associated Service Union (Complainant) v. Cantor Bakery, Carousel Franchising Ltd. (Respondent).

- and -

1651-78-U: Canadian Food and Associated Services Union (Complainant) v. Cantor Bakery, Carousel Franchising Ltd. (Respondent).

- and -

1705-78-U: Canadian Food and Associated Services Union (Complainant) v. Cantor Bakery, Carousel Franchising Ltd. (Respondent).

- and -

1706-78-U: Canadian Food and Associated Service Union (Complainant) v. Cantor Bakery, Caousel Franchising Ltd. (Respondent).

- and -

1756-78-U: Canadian Food and Associated Services Union (Complainant) v. Cantor Bakery, Carousel Franchising Ltd. (Respondent).

- and -

1757-78-U: Canadian Food and Associated Service Union (Complainant) v. Cantor Bakery, Carousel Franchising Ltd. (Respondent). (*Granted*).

1732-78-U: Hotel, Motel and Restaurant Employees Union, Local 442 (Complainant) v. Niagara International Centre (Respondent). (*Granted*).

1995-78-U: Doug Garratt (Complainant) v. Molson's Brewery (Ontario) Limited (Respondent). (*Dismissed*).

2062-78-U: Amalgamated Clothing & Textile Workers Union AFL-CIO-CLC (Complainant) v. Omega Neckwear & Apparel Ltd. (Respondent). (*Withdrawn*).

2069-78-U: Hotel & Club Employees' Union Local 299 (Complainant) v. Hotel Brampton (Respondent). (*Withdrawn*).

2075-78-U: United Steelworkers of America (Complainant) v. Dresser Industries Canada Ltd. (Respondent). (*Withdrawn*).

2128-78-U: Amalgamated Clothing & Textile Workers Union, AFL-CIO-CLC (Complainant) v. Omega Neckwear & Apparel Ltd. (Respondent). (*Withdrawn*).

2135-78-U: Jack McAdam (Complainant) v. Hugh Montgomerie, Business Agent, Local 873 International Alliance of Theatrical and Stage Employees and Motion Picture Machine Operators and and Local 873 I.A.T.S.E. (Respondents). (*Withdrawn*).

2140-78-U: International Beverage Dispensers' and Bartenders' Union Local 280 of the Hotel and Restaurant Employees and Bartenders International Union A.F.L.-C.I.O.-C.L.C. (Complainant) v. Danforth Hotel (Respondent). (*Withdrawn*).

2142-78-U: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 141, affiliated with

the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Laidlaw Transportation Limited (Respondent). (*Dismissed*).

2147-78-U: Canadian Union of Public Employees (Complainant) v. Toronto Auto Parks (Airport) Limited (Respondent). (*Withdrawn*).

2171-78-U: Hotels, Clubs, Restaurants, Tavern Employees' Union, Local 261 (Complainant) v. Don Longchamps and the Sheraton El Mirador Hotel (Respondent). (*Withdrawn*).

2175-78-U: Laura Martins, Delores Carreiros, Jeronima Santos (Complainants) v. United Bakery Workers Association, Local No. 58 Affiliated with the Christian Labour Association of Canada (Respondent). (*Withdrawn*).

2176-78-U: Laura Martins, Delores Carreiros, Jeronima Santos (Complainants) v. Hollandia Bakeries Limited (Respondent). (*Withdrawn*).

0027-79-U: United Electrical, Radio and Machine Workers of America (UE) (Complainant) v. Maclean-Hunter Cable TV Limited (Respondent). (*Withdrawn*).

0085-79-U: Retail Clerks International Union (Complainant) v. United Bakery Workers Association, Local No. 58 Affiliated with the Christian Labour Association of Canada (Respondent). (*Withdrawn*).

0086-79-U: Retail Clerks International Union (Complainant) v. Hollandia Bakeries Limited (Respondent). (*Withdrawn*).

0097-79-U: Retail Clerks Union, Local 206 (Complainant) v. Auto Host Car Rentals (Airport Division) Division of Ontario Chrysler (1977) Limited (Respondent). (*Withdrawn*).

0099-79-U: Theodore E. Landry (Complainant) v. United Steelworkers of America Local 2251 (Respondent). (*Withdrawn*).

0117-79-U: Mrs. Doreen Patterson (Complainant) v. The Stanley Works Limited (Respondent). (*Withdrawn*).

0118-79-U: Mrs. Grace Small (Complainant) v. The Stanley Works Limited (Respondent). (*Withdrawn*).

APPLICATIONS UNDER SECTION 55

1400-78-R: Local 47, Sheet Metal Workers' International Association (Applicant) v. Carleton Air Systems, Carleton Mechanical Air Systems (a Division of 369903 Ontario Limited), Michael John Nowak, The Mechanical Contractors Association of Ottawa (Sheet Metal Division), and The Sheet Metal Workers' International Association, Ontario Sheet Metal Workers' Conference (Respondents) v. Ontario Sheet Metal and Air Handling Group (Intervener). (*Granted*).

1401-78-R: Christian Labour Association of Canada (Applicant) v. Chateau Gardens (Queens) Inc. (Respondent) v. London and District Service Workers' Union, Local 220, SEIU, AFL, CIO, CLC (Intervener).

- and -

1480-78-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Chateau Gardens (Queens) Inc. (Respondent) v. Christian Labour Association of Canada (Intervener).

- and -

1481-78-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Chateau Gardens (Queens) Inc. (Respondent). (*Granted*).

1792-78-R: International Association of Machinists and Aerospace Workers, Local Lodge 2412 (Applicant) v. Longyear Canada Inc. (Respondent) v. United Steelworkers of America (Intervener). (*Granted*).

Unit: "all employees of Longyear Canada Inc. at North Bay save and except foremen, persons above the rank of foreman, charge hands, watchmen, field employees other than plant employees in the field, office, clerical and technical employees, sales staff and cafeteria manager."

Number of names of persons on revised voters' list	140
Number of persons who cast ballots	132
Ballots segregated and not counted	1
Number of ballots marked in favour of applicant	82
Number of ballots marked in favour of intervener	49

2141-78-R: Teamsters Union Local 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Stoney Creek Haulage Limited (Respondent) v. Eric R. Bradt & Son Haulage (Intervener) v. Group of Employees (Objectors). (*Dismissed*).

APPLICATIONS FOR DETERMINATION UNDER SECTION 95(2)

1737-78-M: Ontario Nurses' Association (Trade Union) v.. Sudbury Nursing Homes Ltd. (Employer). (*Terminated*).

1790-78-M: Office and Professional Employees International Union, Local 343 (Trade Union) v. St. Catharines Community Credit Union Limited (Employer). (*Withdrawn*).

REFERENCES TO BOARD PURSUANT TO SECTION 96

2111-78-M: Universal Handling Equipment Company Limited (Employer) v. United Steelworkers of America (Trade Union). (*Dismissed*).

2163-78-M: Gardette Limited (Employer) v. United Steelworkers of America (Trade Union). (*Granted*).

2184-78-M: Windsor News – Division of Benjamin News Co. Ltd. (Employer) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., and its Local 240, U.A.W. (Trade Union). (*Withdrawn*).

2185-78-M: Windsor News – Division of Benjamin News Co. Ltd. (Employer) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W. and Local 195 (Trade Union). (*Withdrawn*).

APPLICATIONS UNDER SECTION 112A

1440-78-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46 and Ontario Pipe Trades Council (Applicant) v. English & Mould Ltd. and Argus Refrigeration & Air-Conditioning Limited (Respondents). (*Dismissed*).

1914-78-M: The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and International Union of Bricklayers and Allied Craftsmen, Local 7 (Applicants) v. Terrazzo, Tile & Marble Guild of Ontario, Inc. and City View Flooring Company Limited (Respondents). (*Granted*).

1915-78-M: The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, and International Union of Bricklayers and Allied Craftsmen, Local 7 (Applicants) v. Terrazzo, Tile & Marble Guild of Ontario, Inc. and Joe Arban Contractor Limited (Respondents). (*Granted*).

1994-78-M: Labourers' International Union of North America, Local 527 (Applicant) v. G. Lundy & Associates Limited (Respondent). (*Withdrawn*).

2000-78-M: Labourers' International Union of North America, Local 183 (Applicant) v. The Metropolitan Toronto Apartment Builders Association and Costain Limited (Respondents). (*Dismissed*).

2072-78-M: International Association of Bridge, Structural and Ornamental Ironworkers, Local Union No. 736 (Applicant) v. Gino's General Welding & Fabricating Ltd. (Respondent). (*Withdrawn*).

2073-78-M: Labourers' International Union of North America, Local 183 (Applicant) v. The Metropolitan Toronto Apartment Builders Association (Respondent). (*Withdrawn*).

2079-78-M: United Brotherhood of Carpenters and Joiners of America Local Union No. 249 (Applicant) v. Normand and Fleming Limited (Fleming Sotramont Corporation) (Respondent). (*Granted*).

2080-78-M: Laborers' International Union of North America, Local 247 (Applicant) v. Normand & Fleming Limited (Fleming Sotramont Corporation) (Respondent)). (*Granted*).

2118-78-M: United Brotherhood of Carpenters and Joiners of America, Local 38 (Applicant) v. P.J. Daly Limited (Respondent). (*Withdrawn*).

2119-78-M: United Brotherhood of Carpenters and Joiners of America, Local 38 (Applicant) v. P.J. Daly Limited (Respondent). (*Withdrawn*).

2127-78-M: Labourers' International Union of North America, Local 183 (Applicant) v. Metropolitan Toronto Apartment Builders Association and Randa Developments Limited (Respondents). (*Dismissed*).

2179-78-M: Labourers' International Union of North America, Local 506 (Applicant) v. Shipp Corporation Limited (Respondent). (*Withdrawn*).

2180-78-M: Labourers' International Union of North America, Local 506 (Applicant) v. Steen Mechanical Contractors Ltd.(Respondent). (*Withdrawn*).

0035-79-M: Christian Labour Association of Canada (Applicant) v. C.H. Heist (Canada) Limited (Respondent). (*Withdrawn*).

0057-79-M: International Union of Operating Engineers, Local 793 (Applicant) v. Employer Bargaining Agency and Connolly's Crane Service (Respondents). (*Withdrawn*).

0058-79-M: International Union of Operating Engineers, Local 793 (Applicant) v. Employer Bargaining Agency, and Eagle Crane Rentals (Respondents). (*Withdrawn*).

0089-79-M: Labourers' International Union of North America, Local 183 (Applicant) v. Frankfurt Investments Limited (Respondent). (*Withdrawn*).

0098-79-M: International Association of Bridge, Structural and Ornamental Ironworkers Local 700 (Applicant) v. Ontario Erectors Association and Nadrofsky Steel Erecting Ltd. (Respondents). (*Withdrawn*).

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

1958-78-R: Labourers' International Union of North America, Local 837 (Applicant) v. Robertson-Yates Corporation Limited (Respondent) v. Operative Plasterers' and Cement Masons' International Association, Local 598 (Intervener #1) v. International Association of Bridge, Structural and Ornamental Ironworkers Local 736, Ironworkers District Council and The International Association of Bridge, Structural and Ornamental Ironworkers (Intervener #2). (*Certified*). (*Request Denied*).

1967-78-R: Canadian Union of Public Employees (Applicant) v. Corporation of the Town of Cochrane (Respondent). (*Certified*). (*Request Denied*).

1989-78-R: The Canadian Union of Public Employees (Applicant) v. Marycrest Home for the Aged (Respondent). (*Certified*). (*Request Denied*).

1213-78-R: Labourers' International Union of North America, Local Union 183 (Applicant) v. G.W. Barr Construction and Engineering Limited (Respondent). (*Dismissed*). (*Request Denied*).



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1627-78-R 1628-78-R United Brotherhood of Carpenters and Joiners of America, Local Union 93, (Applicant), v. **Acto Builders (Eastern) Limited** and **Acto Construction & Engineering Ltd.**, (Respondents).

Related Employer – Whether union unduly delaying application – whether employer engaging in scheme to defeat applicant's bargaining rights – relevant factors considered

BEFORE: R. A. Furness, Vice-Chairman, and Board Members C. Ballentine and C. G. Bourne.

APPEARANCES: *Denis Power, Wilfred Chretien and Wilfred Claremont for the applicants; W. J. McNaughton and M. Flatt for the respondent.*

DECISION OF R. A. FURNESS, VICE-CHAIRMAN AND BOARD MEMBER C. G. BOURNE; June 4, 1979

1. The name of the respondents appearing in the style of cause of these applications as "Acto Builders Limited, Acto Builders (Eastern) Limited, and Acto Construction & Engineering Ltd." is amended to read: "Acto Builders (Eastern) Limited and Acto Construction & Engineering Ltd."
2. The Board directs that the above applications be and the same are hereby consolidated.
3. In File No. 1627-78-R the applicant applied to the Board under section 1(4) of the Act. The applicant alleged that associated or related activities or businesses are or were carried on by the respondents under the common control or direction of Leonard Rudy and Marvin Flatt. The applicant requested, (i) a declaration that the respondents constituted one employer for the purposes of the Act pursuant to section 1(4); (ii) a declaration that the respondents as one employer are bound by the certificate granted by the Board to the applicant on December 6, 1966, for certain employees of Acto Builders Limited; (iii) a declaration that Acto Construction & Engineering Ltd. ("Acto Construction") is required to bargain through the Ottawa Construction Association with the applicant with a view to concluding a collective agreement with respect to the residential sector; (iv) a declaration that Acto Construction is bound by any provincial agreement entered into between the Ontario Provincial Council of Carpenters and Joiners, the employee bargaining agency representing the applicant, and the employer bargaining agency, representing Acto Builders (Eastern) Limited ("Acto Builders") and (v) such further and other relief as may be appropriate in the circumstances.
4. In File No. 1628-78-R the applicant applied to the Board under section 55 of the Act. The applicant has alleged that a sale of a business has taken place from Acto Builders Limited to Acto Builders and that a sale of a business has taken place from Acto Builders to Acto Construction. The applicant requested, (i) a declaration that Acto Builders is a successor employer to Acto Builders Limited, (ii) a declaration that Acto Construction is a successor employer to Acto Builders; (iii) a declaration that by virtue of its certificate dated December 6, 1966, with respect to Acto Builders Limited, the applicant is the certified representative of all carpenters and carpenters' apprentices in the Counties of Carleton (ex-

cepting therefrom Marlborough Township), Russell and Prescott, save and except non-working foremen and persons above the rank of non-working foreman for Acto Builders and Acto Construction; (iv) a declaration that Acto Construction is bound by the provincial agreement entered into between the Ontario Provincial Council of Carpenters and Joiners, the employee bargaining agency representing the applicant, and the employers bargaining agency, representing Acto Construction with respect to the industrial, commercial and institutional sector; (v) a declaration that Acto Construction is required to bargain through the Ottawa Construction Association with the applicant with a view to concluding a collective agreement with respect to the residential sector and (vi) such further and other relief as to the Board seems proper in the circumstances.

5. At the commencement of the hearing it was agreed that Acto Builders Limited had changed its name to Acto Builders (Eastern) Limited in February of 1977 and that in all respects the latter is now the same as the former was before the change in name.

6. It was further agreed that Acto Builders was bound by the collective agreement between the Ottawa Construction Association and the applicant and that Acto Builders is now bound by the provincial collective agreement between The Carpenters Employer Bargaining Agency and The Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America.

7. Acto Construction was incorporated by letters patent on May 5, 1976. It has been performing engineering, project management and general contracting work since its first job in September 1976. The objects for which Acto Construction is incorporated include: (1) to carry on business as general contractors and builders, and carry on all trades in connection therewith; (2) to construct houses, dwellings, apartments, buildings, mills, refineries, factories and warehouses; (3) to build or contract for building, altering, repairing or other work in connection with any and all classes of buildings and improvements of any kind and nature whatsoever; (4) subject to the Professional Engineering Act, to carry on the business of engineering and (5) to improve, alter and manage the said lands and buildings.

8. Acto Builders was incorporated by letters patent on May 10, 1966. The objects for which Acto Builders has been incorporated include; (1) to erect buildings and to deal in building material; (2) to improve, alter and manage the said lands and buildings; (3) to guarantee and otherwise assist in the performance of contracts or mortgages of persons, firms or corporations with whom it may have dealings and (4) to prepare building sites, and to construct, reconstruct, alter, improve, decorate, furnish and maintain offices, flats, houses, apartments and dwellings generally, factories, warehouses and lands, and to consolidate, connect or subdivide properties.

9. Acto Construction commenced tendering in 1976 and performed its first job in September of that year. Acto Builders, on the other hand, has neither tendered on any jobs nor acted as a general contractor in Ontario since September of 1976. At that time Acto Builders was merely engaged in cleaning up a number of jobs. Prior to September of 1976 Acto Builders was engaged in performing work it had contracted to perform. Since the incorporation of Acto Construction only Acto Construction has acted as a general contractor in Ontario. Since September of 1976 Acto Builders has been carrying on business as a general contractor in the province of Quebec. Since 1976 Acto Construction has performed work to the value of five and a half million dollars. Approximately two and a half million

dollars of this work has involved work with respect to engineering and management consulting. Approximately four hundred thousand dollars of the five and a half million dollars is attributable to the value of the labour on the projects. Acto Builders provided carpenters to Acto Construction on projects which involved engineering. Since 1976 there have not been any projects undertaken by Acto Construction in which Acto Builders' carpenters were available and able to perform the required work were not used by Acto Construction.

10. The wording differs on the signs for Acto Construction and Acto Builders. The former's colours are brown and orange and the latter's colours are blue and red. Acto Construction is now offering engineering and management consulting services and performing them as well as carrying on business as a general contractor and as a land developer for third parties.

11. Acto Construction has five regular employees; Mr. Lowe, an engineering technician; an accountant; Mr. Rudy, a professional engineer; Mr. Marvin Flatt; and a secretary. In addition, Acto Construction hires, on an indirect basis, engineers and architects under contract on a job to job basis. Acto Builders has never hired on this basis. Mr. Lowe on occasions acted as site superintendent for labourers, carpenters and sub-contractors who are employed by Acto Construction or Acto Builders. Acto Builders has also acted as a general contractor prior to the end of 1976 and completed the work it was engaged in the early part of 1977. Pursuant to the collective agreement Acto Builders has been checking off benefits to the applicant.

12. During the summer of 1978 Acto Construction subcontracted work which involved forming and footing work. Acto Builders did not normally do such work for itself even prior to 1976. On other occasions Acto Construction has, for a short period of time, subcontracted work which the carpenters who were employed by Acto Builders were unable to do.

13. Wilfred Chretien, a business agent for the applicant, testified that he first became aware of Acto Construction on September 1, 1978. However, it is clear from the evidence that Acto Construction has been openly carrying on business since the end of 1976. On the other hand, Mr. Flatt testified that the applicant was made aware of the existence of Acto Construction in September or October of 1977 when a telephone call was received from the applicant about a non-union sub-trade on one of Acto Construction's projects.

14. At the conclusion of the evidence the parties agreed that there was no evidence of a sale of a business within the meaning of section 55 of the Act. The parties further agreed that the technical requirements of section 1(4) have been satisfied in that Acto Builders and Acto Construction are under common control or direction and carry on related activities or businesses. The applicant asked the Board to exercise its discretion in favour of the applicant. On the other hand, the respondents asked the Board, in the exercise of its discretion, to dismiss this application. This consolidated application in so far as it relates to relief under section 55 is dismissed.

15. In the *Industrial Mine Installations Limited* case, [1972] OLRB Rep. 1029, the Board referred to the purposes of section 1(4) as being generally to avoid the frustration of bargaining rights which have been acquired by a trade union. In the evolution of the exercise of its discretion under section 1(4) the Board has considered the effects of various equi-

ties in a given situation. These equities include a consideration of: (1) whether the applicant is attempting to disturb existing bargaining rights; (ii) whether the applicant is attempting to outflank and avoid an application for certification; (iii) whether there are employees whose interest in selecting their own bargaining agent would be interfered with by the application; (iv) whether the application been made within a reasonable period of time of the knowledge that the two or more respondents are closely related and (v) the presence of a scheme to effectively defeat bargaining rights by transferring work from one respondent to another. See the *Elmont Construction Limited* case, [1974] OLRB Rep. 342; the *Dominion Stores Limited and Min-A-Mart Limited* case, [1978] OLRB Rep. 1013; the *Harold R. Stark Limited* case, [1978] OLRB Rep. 945; and the *West York Construction Limited and Bau Canada Limited* case, [1978] OLRB Rep. 879.

16. In the instant application there are no existing bargaining rights which may be disturbed. The applicant, if successful in this application, would obtain bargaining rights which it could not obtain by means of certification because Acto Construction does not have any employees who are carpenters. Therefore, there are no employees whose interest would be interfered with in selecting their own bargaining agent. The uncontradicted evidence before the Board is that the applicant, as opposed to Mr. Chretien, became aware of the existence of Acto Construction more than a year before this application was filed. In the *Harold R. Stark Limited* case, *supra*, the Board declined to make a declaration where the applicant had delayed eight months in making an application. While both respondents are engaged in operating businesses in the construction industry, the areas in which they operate are different. Acto Construction is engaged essentially in engineering and management consulting while Acto Builders operates as a general contractor. On the balance of the evidence before it, we are not persuaded that Acto Construction was set up as part of a scheme to defeat the applicant's bargaining rights with respect to Acto Builders.

17. Having regard to the foregoing we are not prepared to treat the respondents as one employer for the purposes of The Labour Relations Act. Accordingly, this application with respect to section 1(4) is dismissed.

DECISION OF BOARD MEMBER C. BALLENTINE:

1. This is an application by the United Brotherhood of Carpenters and Joiners of America, Local Union 93, for relief under section 1(4) of the Labour Relations Act. Simply put, the applicant alleges that the two respondents, Acto Builders (Eastern) Limited and Acto Construction & Engineering Limited, are one employer for purposes of the Labour Relations Act and seeks declaratory relief to that effect.

2. Counsel for the respondents admitted that the technical requirements for a declaration under section 1(4) had been met but submitted that the Board ought to refuse, in the exercise of its discretion, to declare that the respondents are one employer for purposes of the Act. Counsel for the respondents relied primarily upon the delay by the applicant in seeking this relief from the Board.

3. Acto Construction was incorporated on May 5th, 1976, and has been carrying on business in the construction industry in Ontario since September of 1976. Acto Builders has also carried on business in the construction industry in Ontario for several years, but since Acto Construction was formed, Acto Builders has neither tendered on any jobs or acted as general contractor in Ontario.

4. Mr. Chretien, the business agent of the applicant, gave evidence that he first became aware of Acto Construction as a separate entity on September 1st, 1978. There was also evidence put before the Board that the applicant had made a phone call to Acto Construction approximately a year earlier relating to the use of a non-union subcontractor on one project in which Acto Construction was engaged.

5. Although the evidence relating to the telephone call may be grounds for the Board to find that the applicant knew or ought to have known about the existence of Acto Construction in September of 1977, such knowledge does not, in my opinion, provide a sufficient reason for this Board to exercise its discretion against the applicant. There was no suggestion in the evidence that the applicant, or any of its members, were detrimentally affected by the activity of Acto Construction at that time. Also, there was no evidence to suggest that the applicant had knowledge that Acto Construction was indeed a separate entity. The phone call relating to the use of a non-union employer on the Acto Construction project may be taken as an indication that the union felt that its collective agreement was being violated. Simply because the union did not pursue the alleged violation at that time is irrelevant. It is not unusual for a contractor bound by a collective agreement to try to use a non-union subcontractor on a particular job. It may well have been the case that work which was performed by the non-union subcontractor was outside of the scope of the applicant's collective agreement. We do not know. In my view the evidence does not suggest that the applicant knew or ought to have known of the existence of Acto Construction as a separate non-union company in late 1977. Further, although Acto Construction extended its scope to include Project Management and Engineering, in the interest of the applicant there was no difference from Acto Builders, both performed as a *General Contractor*.

6. This view is reinforced when one considers the relationship between Acto Construction and Acto Builders. Acto Construction did not employ any carpenters directly. Carpenters employed on the Acto Construction projects were employees of Acto Builders. Acto Builders supplied carpenters to Acto Construction. Those carpenters were paid by Acto Builders although they were working on Acto Construction projects. Indeed, the various remittances under the collective agreement were made by Acto Builders to the applicant for the carpenters employed on Acto Construction projects. For these reasons, the applicant would not have been aware that Acto Construction and Acto Builders were separate companies and that Acto Construction may not have been bound by the collective agreement. The applicant first officially knew that Acto Construction was a separate entity on September 1st, 1978 when the company advised Mr. Chretien that it was not a union contractor. At this time the Carpenters Union was on a legal strike. Acto Construction engaged a non-union subcontractor to perform carpentry work, while the Acto Builders employees were out on strike. It is my opinion this was the first occasion of specific mischief by the respondent companies.

7. The purpose of section 1(4) was discussed by the Board in *Industrial Mine Installations Limited*, [1972] OLRB Rep. Dec. 1029 in the following terms at page 1031:

"Section 1(4) is obviously contemplated to cure the mischief that results from being unable to properly define and tie down the employment relationship. In many situations *where companies have a close relationship an employee may be shifted from one company to another* so that his employment relationship, at any given period, is difficult to define in terms of one employer. ...

Also, in some situations where a union had been granted bargaining rights for the employees of one employer, *the employees could be shifted to another associated or related employer with the result that the bargaining rights which had been earned by the trade union for the employees was lost.*" [emphasis added]

8. In this case the mischief in relation to the applicant is obvious. By use of the corporate vehicle of Acto Builders, Acto Construction is able to employ members of the applicant to perform carpentry work without being bound by the collective agreement. However, should it become inconvenient for Acto Construction to use members of the applicant to perform carpentry work, Acto Construction is then free to hire non-union carpenters, as it did in the September 1st, 1978 incident, thus frustrating the bargaining rights obtained by the applicant.

9. The majority of the Board relies upon the fact that there are no employees of Acto Construction, and therefore there are no bargaining rights which may be affected. It is interesting to note that the majority of the Board states that the applicant, if successful in this application, would obtain bargaining rights which it could not obtain by means of certification *because Acto Construction does not have any employees who are carpenters*. It is precisely for this reason, that is the absence of any direct hire employees, that it is necessary to apply section 1(4) to the facts of this case.

10. Acto Construction, an employer related to Acto Builders Limited, is thus able to avoid the bargaining rights obtained by the applicant for employees of Acto Builders who are employed by Acto Construction. This clearly frustrates the bargaining rights held by the applicant.

11. This issue was dealt with squarely by the Board in *West York Construction Limited*, [1978] OLRB Rep. Sept. 879 where the Board stated at page 881-82:

"There are existing bargaining rights belonging to employees of West York. Bau, however, has no employees, therefore there would be no disturbance of existing bargaining rights. Since there are no employees in Bau, it may be said that there is no attempt to circumvent the normal process of certification, except possibly in respect to any future employees of Bau. It is obvious that there are no present employees whose rights to the selection of a bargaining agent are being jeopardized. ... The Board has some concern about the consequences of granting bargaining rights by means of a section 1(4) declaration in a situation where there are no employees in one of the related companies. However having regard for one purpose of section 1(4) (the protection against the frustration of bargaining rights already earned by a trade union) the Board is concerned that its refusal to grant a section 1(4) declaration in the instant case would leave open to frustration the existing bargaining rights with respect to West York employees. If Bau were to be used to take the same kind of jobs as West York has been doing and then to sub-contract them to contractors other than those permitted by the collective agreement binding West York, then the result would be a circumvention of existing bargaining rights."

12. The matters considered by the Board in *West York Construction Limited* are applicable in the instant case. Here, Acto Construction continues to perform carpentry work and use carpenters employed by Acto Builders without being bound by the collective agreement. In the absence of a declaration under section 1(4) Acto Construction is free to have carpentry work done by non-union carpenters, thereby circumventing the bargaining rights established by the applicant.

13. In the circumstances of this case, I would find that Acto Construction has deliberately flouted the bargaining rights held by the applicant.

14. It is my decision the applicant has met the requirements of section 1(4). The Board should have issued a declaration that the Acto Companies are related entities under common control and direction and constitute a single employer for purposes of The Labour Relations Act.

2034-78-R Local 1590, International Brotherhood of Electrical Workers, Applicant, v. **Bayly Engineering Limited**, Respondent, v. Group of Employees, Objectors.

Certification – Pre-Hearing Vote – Secrecy of segregated ballots maintained

BEFORE: Pamela C. Picher, Vice-Chairman And Board Members F. W. Murray and M. J. Fenwick.

APPEARANCES: *S. B. D. Wahl and J. King for the applicant; D. I. Wakely, Donald Watten, Frances Coones for the respondent and J. Mann and Christine Webb for the objectors.*

DECISION OF THE BOARD; June 7, 1979

1. This is an application for certification.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.

3. A pre-hearing vote was taken by the Board on April 12, 1979. Following the taking of the pre-hearing vote, a group of employees filed with the Board a timely statement of desire to make representations on the conduct of the vote. The employees contend that a new vote should be taken because of circumstances prevailing at the time of the vote which raise a question as to whether the vote would accurately reflect the true wishes of the employees.

4. Mr. John Mann is one of 30 employees of the employer whose ballots the Board ordered segregated pending a resolution of whether or not these employees would be included in or excluded from the bargaining unit. Mr. Mann complained to the Board that he was not aware that his ballot was going to be segregated until he was at the polling station.

He testified that he found it very disturbing to see that the white envelope containing his ballot was placed in a brown envelope which was then identified with his name. Mr. Mann stated, however, that he was given a full explanation of the procedure used by the Board with segregated ballots and was satisfied that his ballot would remain secret in the event that it was ultimately counted.

5. Soon after Mr. Mann voted, a fellow employee whose ballot was also to be segregated went to the polling station and encountered a similar situation. The scrutineer for the company, Ms. Frances Coones, testified that the employee became extremely upset by the fact that a brown envelope containing the white envelope with her ballot was identified with her name. Unlike Mr. Mann, the employee in question was not satisfied with the explanation of the Returning Officer. She called him a dictator and said she didn't trust anyone. She carried on for half an hour in front of approximately twenty-five other employees whose ballots were to be segregated. The scrutineer testified that the Returning Officer explained at least seven times, within the hearing of all employees present, how the secrecy of a segregated ballot was maintained.

6. For clarity for all employees involved, we note that the means by which the Board guarantees the secrecy of a segregated ballot is as follows: segregated ballots remain in the custody of the Returning Officer and the Board. If it is ultimately determined that any or all of the segregated ballots are to be counted, the Returning Officer removes the white envelope from the brown envelope and discards the brown envelope. The Returning Officer then opens the white envelope and removes the ballot in a way which does not reveal the choice expressed thereon and mixes the ballot with the other ballots which are counted in a manner which maintains the secrecy of all ballots. In the event that a segregated ballot is not counted it is destroyed by the Board.

7. There is no evidence in this case to suggest that the other employees at the polling station at the time of the incident were dissuaded from casting ballots because of the reaction of their fellow employee. Furthermore, there is no evidence to suggest that anyone else was concerned that a segregated ballot would in fact amount to a revealed ballot.

8. Having regard to all the evidence the Board is satisfied that neither the Board's procedure of segregated ballots nor the incident at the polling station was of such a nature as to have caused the average employee to have been unable to express his true wishes in the representation vote. There is no evidence whatsoever that anyone other than the single employee was concerned that the secrecy of his ballot would not be maintained. Accordingly, the Board declines to order that a new representation vote be taken.

9. The Board further finds that all employees of the respondent employed at its plant at 167 Hunt Street, Ajax, Ontario save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours a week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

10. The Board is satisfied that not less than thirty-five per cent of the employees of the respondent in the bargaining unit were members of the applicant at the time the application was made.

11. On the taking of the pre-hearing representation vote directed by the Board more than fifty per cent of the ballots were cast in favour of the applicant.
 12. A certificate will issue to the applicant.
 13. The Registrar will destroy the ballots cast in the pre-hearing representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30 day period.
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0675-77-U Bechtel Canada Ltd., (Applicant), v. Mooretown Insulation Contractors Ltd., Eaman-Riggs Limited, K. J. Armstrong, George Anderson Jr., James E. Cable, Leonard Caul, Vincent R. Caul, Christopher D. Clarke, Cecil Vanderveen, Harvey L. Williams, John Ainsworth, Keith Ainsworth, Peter Ainsworth, Steven Ainsworth, Eugene Bowman, Angus Burnett, Eugene Cassibo, Aubin Chiasson, Gerald Chipman, Dave Clements, John Cutler, Leslie Cutler, Gerry Dagenais, John Edgar, Rick Foster, Joseph Giardino, Robert Gilchrist, Edward Hamilton, Mark Heartwell, Robert Hughes, Duncan Jaffray, John Keller, Joseph Lesko, Ian Lightfoot, Howard Mallette, Joseph Matthews, Joseph Miller, Orval Mindle, Steve McCartney, Mike McGhee, Ken MacLeod, Robert MacLeod, Adrian Nearing, Greg Nearing, David Newell, Bert Pasternak, George Pickstock, Helier Richard, Marc Richard, Robert Shepherd, Jim Sizer, John Sizer, Frank Smith, Winston Smith, Ronald Thompson, Greg Twinn, William Valiquette, Dennis Van Der Veeken, William Van Hoof, and George Yetman, (Respondents).

BEFORE: R. A. Furness, Vice-Chairman.

APPEARANCES: *David I. Wakely and Harry Freedman for the Applicant; R.A. Werry and P.M. Rusak for the Respondent employers; Alan M. Minsky and L.C. Arnold for the interested trade unions.*

DECISION OF THE BOARD; June 29, 1979.

1. In a decision dated July 26, 1977, the Board issued a direction pursuant to an application for relief under section 123 of The Labour Relations Act. The instant application was one of a number of applications for relief under section 123 made by various employers engaged in the construction of a two billion dollar petrochemical complex in Moore Township in the County of Lambton. Some five thousand employees were not at work at the complex during an unlawful strike.
2. The Board issued its direction in the following terms:

1. That K. J. Armstrong, George Anderson Jr., James E. Cable, Leonard Caul, Vincent R. Caul, Christopher D. Clarke, Cecil Vanderveen, Harvey L. Williams, John Ainsworth, Keith Ainsworth, Peter Ainsworth, Steven Ainsworth, Eugene Bowman, Angus Burnett, Eugene Cassibo, Aubin Chiasson, Gerald Chipman, Dave Clements, John Cutler, Leslie Cutler, Gerry Dagenais, John Edgar, Rick Foster, Joseph Giardino, Robert Gilchrist, Edward Hamilton, Mark Heartwell, Robert Hughes, Duncan Jaffray, John Keller, Joseph Lesko, Ian Lightfoot, Howard Mallette, Joseph Matthews, Joseph Miller, Orval Mindle, Steve McCartney, Mike McGhee, Ken MacLeod, Robert MacLeod, Adrian Nearing, Greg Nearing, David Newell, Bert Pasternak, George Pickstock, Helier Richard, Marc Richard, Robert Shepherd, Jim Sizer, John Sizer, Frank Smith, Winston Smith, Ronald Thompson, Greg Twinn, William Valiquette, Dennis Van Der Veen, William Van Hoof, and George Yetman, their representatives, agents, substitutes or any person having notice of this direction refrain from:
 - (i) engaging in or threatening to engage in an unlawful strike or in picketing at the construction site of Bechtel Canada Ltd. at 6th Concession Road and Highway 40, Moore Township in the County of Lambton and within a radius of five miles of said construction site.
 - (ii) engaging in any act if he or they know or ought to know that as a probable and reasonable consequence of the act another person or persons will engage in an unlawful strike within a radius of five miles of the construction site of Bechtel Canada Ltd. at 6th Concession Road and Highway 40, Moore Township in the County of Lambton.
2. That K. J. Armstrong, George Anderson Jr., James E. Cable, Leonard Caul, Vincent R. Caul, Christopher D. Clarke, Cecil Vanderveen, Harvey L. Williams, John Ainsworth, Keith Ainsworth, Peter Ainsworth, Steven Ainsworth, Eugene Bowman, Angus Burnett, Eugene Cassibo, Aubin Chiasson, Gerald Chipman, Dave Clements, John Cutler, Leslie Cutler, Gerry Dagenais, John Edgar, Rick Foster, Joseph Giardino, Robert Gilchrist, Edward Hamilton, Mark Heartwell, Robert Hughes, Duncan Jaffray, John Keller, Joseph Lesko, Ian Lightfoot, Howard Mallette, Joseph Matthews, Joseph Miller, Orval Mindle, Steve McCartney, Mike McGhee, Ken MacLeod, Robert MacLeod, Adrian Nearing, Greg Nearing, David Newell, Bert Pasternak, George Pickstock, Helier Richard, Marc Richard, Robert Shepherd, Jim Sizer, John Sizer, Frank Smith, Winston Smith, Ronald Thompson, Greg Twinn, William Valiquette, Dennis Van Der Veen, William Van Hoof, and George Yetman, return to the employment in which they were engaged as employees prior to Thursday, July 21, 1977 at the construction site of Bechtel Canada Ltd. at 6th Concession Road and Highway 40, Moore Township in the County of Lambton on the next regularly scheduled working day following notice of this direction.

3. Upon the issuance of the direction, various similar applications were adjourned *sine die*. See Board Files 0684-77-U, 0692-77-U and 0693-77-U. A copy of the direction was filed in the office of the Registrar of the Supreme Court. Construction work was resumed at the complex.

4. The Board subsequently received a request by Local 663, United Association of the Plumbing and Pipe Fitting Industry of the United States and Canada ("Local 663") that it reconsider its decision. Specifically, Local 663 requested that the Board reconsider that part of its direction which, according to Local 663, on its face purported to bind persons and trade unions who were not parties to the hearing of this application. Local 663 was questioning the Board's jurisdiction to issue a direction containing the words "any person having notice of this direction".

5. The applicant opposed the request for reconsideration and argued that Local 663 did not have status to request reconsideration because it had not been a party to the application under section 123. In a decision dated May 11, 1978, [1978] May OLRB Rep. 401, the Board held that Local 663 had status to make the request for reconsideration and invited argument on the issues raised by Local 663. After the matter was set down for argument it was agreed that written arguments should be filed with the Board.

6. The issues before the Board are as follows:

(1) Does the Board have jurisdiction to bind in a direction persons or trade unions who were not parties to the proceeding culminating in the issuance of the direction, that is to say, the propriety of including in a direction the words "any person having notice of this direction"?

The submissions which were received by the Board were directed for the most part towards this particular issue. However, Local 663 raised two other matters, namely:

(2) Should the direction have been limited by reference to the employer-applicant, that is to say, does the Board exceed its jurisdiction under section 123 where it issues a direction which on its face purports to cover activities directed at employers other than the applicant.

(3) Was the territorial scope of the direction improper, that is to say, did the Board exceed its jurisdiction under section 123 by issuing a direction which on its face purports to cover activities on sites other than the applicant's site? The third issue assumes a positive response to the second issue. If the Board is without jurisdiction to issue a direction with respect to activities directed against employers other than the applicant employer, nevertheless can it issue a direction covering other sites of the applicant employer?

7. In its written submission, Local 663 argues that although section 123 confers upon the Board the widest possible discretion such discretion in its exercise is structured by sections 5 and 6 of *The Statutory Powers Procedure Act 1971*, S.O. 1971, c.47, section 98 of the Board's Rules, and those common law rules of natural justice collectively known as the

principle *audi alteram partem*. As authority for this proposition, it cites *Regina v. Canada Labour Relations Board, ex parte Martin*, [1966] 2 O.R. 684 (C.A.) where Wells, J.A., speaking for himself and McGillivray, J.A., in discussing the Canada Labour Relations Board's discretion to grant a certificate, said that although the Board's enabling statute granted it the widest possible discretion, that discretion was subject to the general law, and in particular the rules of natural justice. Local 663 submits that it was entitled to the protections of these statutory provisions and common law rules because the Board's direction adversely affected its interests. It concedes that the direction did not modify in any way its substantive rights. Prior to the Board's decision, neither Local 663 nor anyone else for that matter had a right to engage in an unlawful strike or unlawful picketing. What the Board did, according to Local 663, by including within its direction the words "any person having notice of this direction" was to transform the consequences which Local 663 might face in the event that it might choose to engage in an unlawful strike or unlawful picketing, and that this transformation sufficiently affected, in an adverse way, its interests so as to trigger the rights and protections of those statutory provisions and common law rules which it claims fetter the Board's exercise of its discretion under section 123. Local 663 reasons that should it choose to engage in an unlawful strike or unlawful picketing; rather than being faced with the possibility of having to defend itself before the Board in a section 123 application, which it would have been had the Board not included within its direction the impugned words; it would be faced with the possibility of having to defend itself before the Supreme Court on a charge of civil or criminal contempt by virtue of section 123(3) of the Act. Local 663 cites nothing in support of the proposition that a transformation of potential liabilities constitutes a sufficient basis for the application of *The Statutory Powers Procedure Act 1971*, section 98 of the Boards Rules or the rules of natural justice. Assuming that it was entitled to the protections that it claims entitlement to, Local 663 asserts that it ought to have been given notice of the Board's hearing and to have been provided with an opportunity to be heard, and that the failure of the Board to have provided either constitutes a jurisdictional defect in the proceeding, and as such the Board's direction should be vacated. In support of the proposition that a party adversely affected by a tribunal's decision is entitled to notice of hearing and an opportunity to be heard, Local 663 relies on *Bradley et al and the Ottawa Professional Firefighters*, [1967] 2 O.R. 311 (C.A.), *Hoogendoorn v. Greening Metal*, [1968] S.C.R. 30; *Alliance des Professeurs Catholique*, [1953] 4 D.L.R. 161 (S.C.C.), Reid, *Administrative Law*, De Smith, *Administrative Law*, and *Halsbury, The Laws of England*; and in support of the proposition that a tribunal which proceeds in a manner in violation of the procedural rights of persons affected by its deliberations commits a jurisdictional error, it cites *Halsbury, The Laws of England*.

8. On the other hand, Local 663 recognizes that both the courts and the Board have for many years used this form of direction or order. Nevertheless, it maintains that the direction is invalid. Local 663 quotes extensively from *Marengo v. Daily Sketch and Sunday Graphic Ltd.*, [1948] 1 All E.R. 406 (H.L.) and *Griffin Steel Foundries Limited v. Canadian Association of Industrial, Mechanical and Allied Workers et al* (1978), 80 D.L.R. (3d) 634, and argues that both cases are authority for the proposition that neither a court nor a tribunal can bind strangers to the proceedings giving rise to the order. In addition, Local 663 supports its position by reference to *C.P.R. Co. v. Brady et al* (1961) 26 D.L.R. (2d) 104 (B.C.S.C.), *Evergreen Press Ltd. v. Vancouver Typographical Union, Local 226* (1959), 18 D.L.R. (2d) 401 (B.C.S.C.) and *Toronto-Dominion Bank v. Car-Tree International Ltd. et al* (1968) 66 D.L.R. (2d) 552 (Sask.Q.B.). Local 663 complains as well of the direction's lack of reference to a specified employer. Local 663 also argues that as a prerequisite to the is-

suance of a direction under section 123 of the Act, the Board must be satisfied that unlawful strike activity occurred in relation to a certain specified employer contrary to section 63 of the Act. Finally, Local 663 says that the geographic scope of the direction is too wide because it includes persons who were not parties to the proceeding, namely, employees working on sites other than the applicant's site yet within the five mile radius prescribed in the direction.

9. The applicant takes the position that the direction in question constituted a valid exercise of the Board's jurisdiction under section 123 of the Act. The applicant argues that in the circumstances at the time surrounding the application the direction made was the only possible one which would have had the desired effect of furthering the legislative objects and purposes of section 123 of the Act; namely, the elimination of a costly work stoppage during prime construction time and the encouragement of a peaceful resolution to the dispute. Reference was made to the *Dover Corporation (Canada) Ltd.* case, [1972] OLRB Rep. May 435; the *Norfolk Hospital Association* case, [1974] OLRB Rep. Sept. 581; the *Acoustical Association Ontario* case, [1975] OLRB Rep. July 539. The applicant argues that in exercising its discretion under section 123, the Board unlike a court must not only consider the interests of the immediate parties to the dispute but also the interests of the public as well, (*Alex Tomko v. Labour Relations Board (Nova Scotia) et al* (1977), 69 D.L.R. (3d) 250 (S.C.C.)); the *St. Joseph's Hospital* case, [1976] OLRB Rep. June 255, the *North Simcoe Electrical Contracting Ltd.* case [1973] OLRB Rep. June 336; the *Wheelabrator Corporation of Canada Ltd.* case, [1974] OLRB Rep. July 490). It asserts that the direction recognizes these considerations; and moreover was necessitated by the circumstances of the application.

10. In addition, the applicant claims that the Board has on several occasions issued cease and desist directions where the consequences of the unlawful activity extend beyond the immediate parties to the application, (*Norfolk Hospital Association* case, *supra*; *Acoustical Association Ontario* case, *supra*); and that both the Board and the courts have issued directions in the past in the same form as the direction which Local 663 has argued is invalid. See, for example, the *Pilkington Brothers (Canada) Limited* case, [1976] OLRB Rep. Jan. 988; the *Pigott Construction Limited* case, [1976] OLRB Rep. 160; *Hallnor Mines Ltd. v. Behie et al*, [1953] O.W.N. 868; *MacMillan Bloedel (Alberni) Ltd. v. Swanson et al*, (1972) 26 D.L.R. (3d) 641; *Re Tilco Plastics Ltd. v. Skurjat et al*, [1966] 2 O.R. 547; *Catkey Construction Ltd. v. Moran* (1970), 8 D.L.R. (3d) 413; and *General Printer Ltd. v. Thomson et al* (1965), 46 D.L.R. (2d) 697. The applicant claims that the cases relied on by Local 663 as supporting the proposition that a direction cannot be made by a court or a tribunal which has the effect of binding non-parties do not stand for such a proposition, and even if they do, they have been overruled by *Bartle and Gibson Company Limited v. Retail, Wholesale, and Department Store Union, Local 580* (1971), 18 D.L.R. (3d) 232 (B.C.C.A.). The applicant argues that the Supreme Court of Canada in *I.B.E.W. Local 2085 v. Winnipeg Builders Exchange* (1967), 65 D.L.R. (2d) 242, upheld the validity of an order which included the words "or any other person having notice of this Order". Finally, the applicant contends that the direction does not constitute a contravention of either *The Statutory Powers Procedure Act 1971* or the principle *audi alteram partem*. The applicant argues that the direction does not affect the civil, contractual, or property rights of Local 663 and as such Local 663 was not entitled to notice of the hearing or an opportunity to be heard.

11. It is helpful at this stage to set forth the legislation which has been referred to by the parties. The relevant provisions of *The Statutory Powers Procedure Act, 1971*, are:

“1. (d) ‘statutory power of decision’ means a power or right, conferred by or under a statute, to make a decision deciding or prescribing,

- (i) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or

...

3.-(1) Subject to subsection 2, this Part applies to proceedings by a tribunal in the exercise of a statutory power of decision conferred by or under an Act of the Legislature, where the tribunal is required by or under such Act or otherwise by law to hold or to afford to the parties to the proceedings an opportunity for a hearing before making a decision.

...

5. The parties to any proceedings shall be the persons specified as parties by or under the statute under which the proceedings arise or, if not so specified, persons entitled by law to be parties to the proceedings.

6.-(1) The parties to any proceedings shall be given reasonable notice of the hearing by the tribunal.

(2) A notice of a hearing shall include,

- (a) a statement of the time, place and purpose of the hearing;
- (b) a reference to the statutory authority under which the hearing will be held; and
- (c) a statement that if the party notified does not attend at the hearing, the tribunal may proceed in his absence and he will not be entitled to any further notice in the proceedings.

...

10. A party to proceedings may at a hearing,

- (a) be represented by counsel or an agent;
- (b) call and examine witnesses and present his argument and submissions;
- (c) conduct cross-examination of witnesses at a hearing reasonably required for a full and fair disclosure of the facts in relation to which they have given evidence.

...

32. Unless it is expressly provided in any other Act that its provisions and

regulations, rules or by-laws made under it apply notwithstanding anything in this Act, the provisions of this Act and of rules made under section 33 prevail over the provisions of such other Act and over regulations, rules or by-laws made under such other Act which conflict therewith.”

The relevant provisions of The Labour Relations Act are:

“123.-(1) Where on the complaint of an interested person, trade union, council of trade unions or employers’ organization the Board is satisfied that a trade union or council of trade unions called or authorized or threatened to call or authorize an unlawful strike or that an officer, official or agent of a trade union or council of trade unions counselled or procured or supported or encouraged an unlawful strike or threatened an unlawful strike, or that employees engaged in or threatened to engage in an unlawful strike, it may direct what action if any a person, employee, employer, employers’ organization, trade union or council of trade unions and their officers, officials or agents shall do or refrain from doing with respect to the unlawful strike or the threat of an unlawful strike.

(2) Where on the complaint of an interested person, trade union, council of trade unions or employers’ organization the Board is satisfied that an employer or employers’ organization called or authorized or threatened to call or authorize an unlawful lock-out or locked out or threatened to lock out employees or that an officer, official or agent of an employer or employers’ organization counselled or procured or supported or encouraged an unlawful lock-out or threatened an unlawful lock-out, it may direct what action if any a person, employee, employer, employers’ organization, trade union or council of trade unions and their officers, officials or agents shall do or refrain from doing with respect to the unlawful lock-out or the threat of an unlawful lock-out.

(3) The Board shall file in the office of the Registrar of the Supreme Court a copy of a direction made under this section, exclusive of the reasons thereof, in the prescribed form, whereupon the direction shall be entered in the same way as a judgment or order of that court and is enforceable as such.”

And the relevant provisions of the Board’s Rules of Procedure are:

“1.-(1) In these Rules,

...

- (b) ‘party’ means an applicant or complainant and each person served with notice of the application or complaint, or a person added as a party by the Board under section 54;

...

54. The Board may direct that any person be added as a party to a proceeding or be served with any document, as the Board considers advisable.

...

97.-(1) An application to the Board under section 123 of the Act shall be made in quadruplicate in Form 75.

(2) Section 2 does not apply to applications under subsection 1.

98. The registrar shall serve upon the respondent or respondents, as the case may be, a notice of application and of hearing in Form 76 and he shall serve upon the applicant a notice of hearing in Form 7."

12. *The Statutory Powers Procedure Act, 1971*, provides minimum rules for proceedings of certain tribunals including the Ontario Labour Relations Board. By virtue of section 3 of that Act, a tribunal in the exercise of a statutory power of decision (defined by section 1(1)(d) of that Act) is required to adhere to the minimum requirements set out in Part I of that Act, including notice of hearing and an opportunity to be heard, provided that a hearing is required by reason of the tribunal's enabling legislation or otherwise by law. The right to a hearing as traditionally elaborated is dependent upon the characterization of a tribunal's decision-making process as quasi-judicial. Assuming that the Board's exercise of its discretion under section 123 of the Act can be so characterized, what persons pursuant to *The Statutory Powers Procedure Act, 1971*, are entitled to the protections of section 6 and section 10 of that Act? Notice of hearing under section 6 and the right to participate in a hearing under section 10 apply to those persons who are parties to a proceeding. Under section 5 of the Act, parties to a proceeding are defined as being those persons specified as parties by or under the statute under which proceeding arises or, if not so specified, persons entitled by law to be parties to the proceeding.

13. It may be argued that The Labour Relations Act and the Board's Rules of Procedure specify the parties to an application under section 123. Section 98 of the Board's Rules mandates the Registrar to serve notices of hearing on the applicant and the respondents. Section 54 permits the Board a discretion to add parties where it considers advisable. Section 98 and section 54, however, when read together may be said to specify the parties to an application under section 123. Is there, then, any need to have recourse to the general law? This approach, however, does not establish a rule under which the Board should exercise its discretion under section 54. Clearly, section 98 does not in itself determine the parties to an application under section 123. Section 98 mandates the Registrar to serve notices upon the immediate parties to the proceeding, but it does not limit the serving of such notice on only those parties referred to in section 98. In the last resort the Board has a discretion under section 54 of the Board's Rules to add parties to a proceeding. In exercising this discretion the Board has reference to the general law.

14. In *Regina v. Canada Labour Relations Board, Ex parte Martin*, [1966] 2 O.R. 684, a case relied upon by Local 663, Wells, J. A., said of the powers granted the Canada Board under its Rules of Procedure in respect to certification hearings:

"In his argument, counsel for the Attorney-General of Canada suggested

that the *Industrial Relations and Disputes Investigation Act* was an Act which gave the Labour Relations Board established by it, quite arbitrary powers. Speaking for myself, I would prefer to say that it had been given a very wide discretion in the exercise of its powers, but in my view that discretion does not place it above the general law of the land or enable it to disregard it. In exercising its discretion in my opinion, it is bound by, among other things, the powers which are compendiously brought together under the term, natural justice. If Parliament had intended to remove the necessity of observing this salutary rule, that it must do natural justice, it would have, in my opinion, expressed its intention in much clearer and more explicit language."

15. There is nothing in either the Board's Rules of Procedure or The Labour Relations Act from which it may be concluded that the Board may ignore the general law in determining the parties in an application under section 123. In the Board's view, whether Local 663 is entitled to be a party to the proceeding under an application under section 123 and so entitled to the rights under sections 6 and 10 of *The Statutory Powers Procedure Act, 1971*, is to be determined in accordance with the general law.

16. The applicant argues that a direction will issue under section 123 where the unlawful activity extends beyond the immediate parties to the dispute. In support of that proposition, it cites the *Norfolk Hospital Association* case, *supra*, and the *Acoustical Association Ontario* case, *supra*. These two cases are not relevant to the present issue. They address the question of the factors which the Board will consider in deciding whether to issue a direction where the unlawful activity has ceased. These two cases do not stand for the proposition that in the name of industrial peace, the Board may bind anyone necessary to the attainment of that objective.

17. Local 663 must demonstrate that the Board's direction in some way adversely affected its interests. Local 663 concedes that the Board's direction did not affect its substantive rights. It claims that its entitlement to the protection of either *The Statutory Powers Procedure Act, 1971*, or the common law is derivative of what it asserts is a transformation of its liabilities as a consequence of the decision. Local 663 in justification of its position referred the Board to a number of decisions wherein the courts have questioned the validity of purporting to bind non parties to a court order. The approach taken by the courts in various jurisdictions to the question shows considerable variation. In *Marengo v. Daily Sketch and Sunday Graphic, Ltd.* [1948] 1 All E.R. 406, a lower court had issued an injunction in a passing-off action, restraining the defendants, their staff, servants and agents from doing certain acts. The Law Lords concurred in the decision of Lord Uthwatt who in his judgment varied the order so as to read "restraining the defendants by their servants, workmen, agents, or otherwise" from commission of the acts to be enjoined. His Lordship reasoned that although the form of the order issued by the lower court had been issued as a matter of course for over one hundred years it was technically wrong and that a court cannot "hold a man bound by an injunction, who is not a party in the cause for the purpose of the cause". His Lordship referred to *Iveson v. Harris* (1802) 7 Ves. 251, per Lord Eldon. In attempting to explain why the courts had issued the impugned order for over one hundred years, Lord Uthwatt pointed out at page 407:

"The reference to servants, workmen, and agents in the common form is nothing other than a warning against wrongdoing to those persons who may

by reason of their situation be thought easily to fall into the error of implicating themselves in a breach of the injunction by the defendant. There its operation, in my opinion, ends. If they knowingly assist the defendant in a breach by him of the injunction, they may be committed for contempt of court, not because they have broken the injunction – they have not done so – but because they have so conducted themselves as to obstruct the course of justice in assisting a breach and tried to set process of the court at naught. In that respect they stand in no different position from a complete stranger who knowingly sets out to assist the defendant in committing a breach. The position of a stranger who assists a defendant in committing a breach of an injunction was dealt with by North, J., and the Court of Appeal in *Seaward v. Paterson* and need not be elaborated. I would, however, observe that North, J., had in that case to consider whether one Sheppard should not also be committed for contempt. Without pausing to decide whether Sheppard was or was not a servant of the person enjoined – he said that was immaterial – North, J., ordered his committal on the ground that he had knowingly assisted in a breach of the injunction by the defendant. It is unfortunate that the order as made (see *Seton's Judgments and Orders*, 7th ed., Vol. I, p. 430) took the form that he was committed for breaking the injunction.”

18. In *Evergreen Press Ltd. v. Vancouver Typographical Union, Local 226* (1959), 18 D.L.R. (2d) 401 (B.C.S.C.), on a motion that an interlocutory order be varied or dissolved, the court varied the original order by striking out the words “all persons having knowledge of this order” because it could find no authority for including within an order persons who were not parties to the action; and in *Toronto-Dominion Bank v. Car-Tree International Ltd. et al* (1968), 66 D.L.R. (2d) 552 (Sask. Q.B.), the court dissolved an injunction restraining the Commissioner of Patents from registering a disputed industrial design on the grounds that the Commissioner had no notice of the original application. In *C.P.R. Co. v. Brady et al*, (1961), 26, D.L.R. (2d) 104 (B.C.S.C.), the court varied an order restraining unlawful picketing by striking out the words “all persons having knowledge of the order”. In doing so, Collins, J. said at page 114:

“Although there have been several restraining orders issued in other actions, in this Court and in other Courts of comparable jurisdiction to restrain not only defendants, their servants and agents, but also purporting to restrain all persons to whom knowledge of the order shall come, I have never been satisfied that the Court has jurisdiction to make an order to restrain a person who was neither a party to the action nor the servant or agent of a party to the action, nor someone acting on his behalf. While it seems clear that persons who with knowledge of the order take any steps to assist in contravening it may be proceeded against for contempt of Court, nevertheless it appears that the court is without jurisdiction to make an order restraining a person who is neither a party nor the servant or agent of a party nor someone acting on his behalf, see *Seaward v. Paterson*, [1897] 1 Ch. 545 at pp. 551-2, 555 and 558, and *Ranson v. Platt*, [1911] 2 K.B. 291 at p. 307, both of which were decided by the Court of Appeal in England. I am reinforced in this view by the reasons for judgment of my brother Macfarlane, J., in *Evergreen Press Ltd. v. Vancouver Typographical Union, Local 226* (1959), 18 D.L.R. (2d) 401. It is true that one or more restraining orders purporting to

restrain “anyone having knowledge of this order” have been confirmed on appeal by the appellate Court of this Province and of one or more other Provinces, but in none of the relevant reasons for judgment in the appellate Courts which have come to my attention have I found any indication that the appellant had raised that particular question on appeal or that the appellate Court had given consideration to this question of jurisdiction.”

19. A more recent decision on the issue comes from the Manitoba Court of Appeal. In *Griffin Steel Foundries Limited v. Canadian Association of Industrial Mechanical and Allied Workers et al*, *supra*, the Court dissolved an ex parte injunction enjoining the named defendants and “any person having notice of this order” from picketing the plaintiff’s premises. The Court quoted approvingly from *Marengo v. Daily Sketch and Sunday Graphic Ltd.*, *supra*, and amended the order by striking out the words in quotations. However, notwithstanding this line of decisions the Courts have continued orders and directions restraining “persons having notice of this order”. In *Barile and Gibson Company Limited v. Retail, Wholesale, and Department Store Union, Local 589 et al*, *supra*, the British Columbia Supreme Court issued an order against the named defendants and “or anyone having knowledge of this order” restraining them from picketing the premises of the plaintiff. On appeal, counsel for the appellant, the defendant union in the original proceeding, argued that the order was made without jurisdiction in that it bound persons who were not parties to the original proceeding. The British Columbia Court of Appeal’s decision was delivered by Tysoe, J.A.. He rejected counsel’s contention and expressed disapproval of the decision in *C.P.R. Co. v. Brady et al*, *supra*. The Court reasoned that if an individual who had knowledge of the existence of a court order contravened the order he may be proceeded against for contempt of court, even though not named in the order, why should not the order provide that it covers persons having knowledge of the order. In other words, Tysoe, J.A. thought there was nothing wrong with making explicit a matter which was implicit in any event.

20. The leading case in Ontario on the power of a court to commit for contempt an individual who knowingly acts in contravention of a court order is *Re Tilco Plastics Ltd. v. Skurjat et al*, [1966] 2 O.R. 547. After the commencement of a legal strike, the employer, Tilco Plastics Ltd., obtained an injunction limiting to twelve the number of picketers at its plant entrances. The order enjoined “persons or persons having notice of the order”. Some three months after the commencement of the strike, the bargaining agent organized a demonstration at the entrance to the plant and which resulted in a confrontation between the police and the demonstrators. The Attorney-General by originating notice of motion requested the committal of twenty-seven persons, several of whom were not specifically mentioned by the terms of the order. They may have had notice of the order. Counsel for the defendants contended that the Attorney-General was required to prove that the defendants had actual notice of the order. He further contended that the only way the Attorney-General could prove actual notice was to prove that the order had been served personally on the defendants. Counsel for the Attorney-General argued that he need only prove that the defendants had knowledge of the contents of the order. Gale, C.J.H.C. (as he then was) agreed with counsel for the Attorney-General and stated at pages 568 to 570:

“The Attorney-General’s proposition that proof of actual knowledge of the substance of a Court order is sufficient in contempt proceedings is supported by the English case of *Seaward v. Paterson*, [1897] 1 Ch. 545. In that action,

the committal of three individuals was sought for their disobedience to an injunction order. The disobedience consisted of the holding of boxing matches on premises which were protected against such activity by an injunction order obtained by the landlord and others against the tenant Paterson. Paterson, a defendant in the original action, was one respondent; Shephard, a servant of Paterson, was another respondent; and Murray, an allegedly innocent spectator, was the third respondent. Both Mr. Justice North and the Judges of the Court of Appeal had little difficulty in finding contempt against Paterson and Shephard. With respect to Murray, however, North, J., found it necessary to point this out at p. 550:

‘It is said that he had no notice of the injunction. It is true he was not served with the order until November 9 [after the alleged contempt]; but this is immaterial, because it is clear that he knew all about the injunction from the very first.’

The judgment of Mr. Justice North was affirmed unanimously by the Court of Appeal.

The following statement is that of Middleton, J., in *Re Bolton and the County of Wentworth* (1911), 23 O.L.R. 390 at p. 395:

‘Formerly, in order to found proceedings for contempt, great strictness in proof of service was required, but it is now well established that knowledge is all that is necessary. This is more consistent with reason and principle.’

See also: *Glazer v. Union Contractors Ltd. and Thornton* (1960), 25 D.L.R. (2d) 653 at p. 658, 129 C.C.C. 152 at p. 156, 33 W.W.R. 145 [affd 26 D.L.R. (2d) 349, 129 C.C.C. 150, 34 W.W.R. 690], *per* Norris, J.: *United Telephone Co. v. Dale* (1884), 25 Ch. D. 778 at pp. 786-7, and *Kerr on Injunctions*, 6th ed., p. 671.

This principle is not only consistent with good sense but also with another well-established principle, and that is that although persons who are not parties to the action in which an injunction is granted cannot be in *breach* of that order, they can be found guilty of contempt for *knowingly* acting in contravention of it: *Ruthig v. Stuart Bros. Ltd.* (1923), 53 O.L.R. 558 at p. 563; *Glazer v. Union Contractors Ltd. and Thornton*, *supra*, at p. 658 D.L.R., p. 156 C.C.C.; *Tony Poje et al. v. A.-G.B.C.*, [1953] S.C.R. 516 at p. 519, [1953] 2 D.L.R. 785 at p. 789, 105 C.C.C. 311. Lord Justice Lindley in the *Seaward* case, *supra*, puts the matter in this way (at pp. 555-6):

‘A motion to commit a man for breach of an injunction, which is technically wrong unless he is bound by the injunction, is one thing; and a motion to commit a man for contempt of Court, not because he is bound by the injunction by being a party to the cause, but because he is conducting himself so as to obstruct the course of justice, is another and a totally different thing. The difference is very marked. In the one

case the party who is bound by the injunction is proceeded against for the purpose of enforcing the order of the Court for the benefit of the person who got it. In the other case the Court will not allow its process to be set at naught and treated with contempt.'

In the *Glazer* case committal was sought against the Minister of Highways for the Province of British Columbia as well as against one who had been a party to the action in which the Court order in question had been granted. The Minister was found guilty of contempt for his complicity in the contemptuous act involved as Mr. Justice Norris found that the plaintiff had proven beyond a reasonable doubt that the Minister had notice, in the sense of knowledge, of the nature of the order contravened.

The overriding concept, governing the principles as applied in both the *Seaward* case and the *Glazer* case is that of public respect for the orders of our Courts. All members of the public are bound to obey Court orders in the sense that they must not deliberately act in defiance of them or aid others to do so. If it were otherwise, it would be a simple matter for the actual parties involved in the granting of a Court order to enlist the aid of others and to thereby circumvent the order.

It was admitted by Mr. Jolliffe that the words "person or persons having notice to this order" were published in the Peterborough Examiner in the late afternoon of Wednesday, February 23, 1966, but he argued that this one insertion could not be relied upon to charge the respondents with notice of those words. In my opinion, the insertion of those words in the order of King, J., did not affect the legal obligations of members of the public, one way or the other. The words may have been inserted to remind the respondent that the order could not be circumvented by any one having knowledge of it, but that is not material. Any person who is aware of the substance of nature of a Court order cannot flout it simply because he is not expressly named in that order. It follows, therefore, that Mr. Jolliffe's argument that his clients may not have known that the order contained such a clause cannot provide them with a defence."

21. The applicant has argued that *Re Tilco Plastics v. Skurgat et al, supra*, is authority for the proposition that a court may bind non-parties. In the Board's view, Gale, C.J.H.C. (as he then was) specifically states that persons who are not parties to the action, cannot be in breach of any order derivative of the action. Moreover, in discussing the significance of the inclusion in the order of the words "person or persons having notice of this order" he says that those words have no effect on the legal obligations of the public. The Board notes that *Tilco Plastics* was followed in *Catkey Construction Ltd. v. Moran* (1970), 8 D.L.R. (3d) 413.

22. The general law as a guide to the exercise of the Board's discretion under section 54 of the Boards Rules of Procedure does not clearly point in one direction. In *I.B.E.W. Local 2085 v. Winnipeg Builders Exchange, supra*, the Supreme Court of Canada considered the effect of an injunction which required employees to return to work. The injunction was directed to, *inter alia*, "...or any other persons having notice of this order...". The appropri-

ateness of such an inclusion in the injunction, however, was not raised before the Court. More recently, in *International Longshoremen's Association, Local 273 et al v. Maritime Employers' Association*, (1979) 89 D.L.R. (3d) 289, Estey, J. at page 307 approved of broader language in injunctions in labour relations disputes and stated that such language has been adopted for many years, "no doubt for the good reason that it makes the impact and sense of the order clear to all those likely to be affected thereby and, in any event, such wording can hardly be said to harm any of the persons in law affected by the order".

23. Under *The Statutory Powers Procedure Act, 1971*, parties to any proceedings are entitled to notice of a hearing and to participate in such hearing. Local 663 and its members, in order to be adversely affected, have to engage in illegal activity in the form of an unlawful strike. In our view, at such time any person who is affected by the Board's direction may request the Board to hold a hearing to reconsider its decision pursuant to section 95(1). At such time the Board may reconsider the exercise of its discretion in so far as it relates to parties who have not received notice of the initial hearing.

24. There is nothing in the material before the Board which provides a basis for deleting the words "or any person having notice of this direction".

25. The International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 ("Local 95") joined Local 663 in raising the second and third issues in paragraph six herein. With respect to the second issue, the direction is not limited by reference to the applicant because the individuals referred to in the direction in fact worked for more than one employer. The Board is not persuaded that it should reconsider the terms of its direction on the second issue as requested by Local 95 and Local 663. With respect to the third issue, the direction specifically refers to the applicant's site. The inclusion of a reference to a radius of five miles was necessary because of the immensity of the site and the system of ingress and egress from that site. The Board is not persuaded that it should reconsider the terms of its direction on the third issue as requested by Local 95 and Local 663.

26. In the further result, the Board finds that it has not exceeded its jurisdiction with respect to the second and third issues raised by Local 95 and Local 663 in paragraph six herein.

2028-78-R The Hotel & Club Employees' Union Local 299, Toronto, Ontario of the Hotel and Restaurant Employees' and Bartenders' International Union, (A.F.L.-C.L.C.-C.I.C.), Applicant, v. **The Bristol Place Hotel**, Respondent.

Certification – Practice and Procedure – Pre-Hearing Vote – Applicant requesting withdrawal after vote – Application dismissed – six month bar imposed

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members H. J. F. Ade and O. Hodges.

DECISION OF THE BOARD; June 25, 1979

1. Pursuant to the Board's direction issued April 17, 1979, a pre-hearing representation vote was held on April 27th and certain ballots were segregated and the box sealed in accordance with the Board's direction, therefore the ballots cast have not been counted.
2. The Board has received a request from counsel for the applicant for leave to withdraw the application. Counsel's letter contains the following reason for making the request: "...it appears that our client cannot establish sufficient evidence of membership to entitle it to a pre-hearing vote and this is true even if all of our client's objections to the list are sustained.". Having regard for the stage of the proceedings at which this request has been made, it is denied and the application is dismissed. Furthermore, since the pre-hearing representation vote has already been held, this raises the question of whether the Board should exercise its discretion under section 92(2)(i) to apply a bar to further applications from the applicant.
3. The instant application was filed on March 8th, 1979. The same applicant had filed a prior application for the same employees on January 30th, 1979 and by letter March 9th, 1979, requested leave to withdraw that application. By a decision issued on the latter date, the Board refused leave and dismissed the application. In the earlier case, however, no representation vote had been directed so the Board did not impose any bar. The respondent in the application currently before the Board asked it to dismiss the application as untimely because it was filed prior to the dismissal of the earlier one. The Board would not grant the respondent's request for the reasons stated in its decision issued April 17th.
4. Section 8 of The Labour Relations Act deals with applications which request the holding of a representation vote without a hearing of the Board. Subsection 2 gives the Board the discretion to direct a representation if "... it appears to the Board on an examination of the records of the trade union and the records of the employer that not less than thirty-five per cent of the employees in the voting constituency were members of the trade union at the time the application was made. ..." Once the vote has been held, subsection 4 directs the Board to "... determine the unit of employees that is appropriate for collective bargaining and, if it is satisfied that not less than thirty-five per cent of the employees in such bargaining unit were members of the trade union at the time the application was made,...", and certify the applicant if more than fifty per cent of the ballots cast were in its favour.
5. In the application at hand, the Board cannot determine the appropriate unit until it has dealt with the ballots and the sealing of the box. It follows, therefore, that neither can the Board satisfy itself that the applicant had the membership support of at least thirty-five per cent of the employees in the unit nor determine the outcome of the vote. It is between the taking of the vote and the making of these determinations by the Board that the applicant is seeking leave to withdraw this application.
6. Before deciding whether the Board should impose a bar in the circumstances of this application, the Board finds it useful to review the exercise of its discretion under section 92(2)(i) of the Act. When a representation vote has been held and the applicant has failed to gain the membership support required, the Board will dismiss the application and impose a bar on future applications, generally for a duration of six months. Amongst its reasons for so doing are: to provide a cooling off period during which the employees may assess their position with respect to their desire to be represented by the applicant (see *The Watson Manufacturing Company of Paris Limited*, [1968] OLRB Rep. Aug. 441); or because

the Board does not consider repetitious applications where the membership evidence has been fully tested by a vote to be in the interest of sound labour relations (see *Campbell Soup Company Ltd.*, [1968] OLRB Rep. Feb. 1091). Whether the Board will exercise its discretion and impose a bar in situations where it dismisses an application, following a request for leave to withdraw, depends upon the particular circumstances of that application. If, for example, while the parties to an application for a pre-hearing representation vote are meeting with a Labour Relations Officer to arrange the vote the applicant seeks to withdraw an application because it appears that the applicant has the support of less than thirty-five per cent of the members in the voting constituency, a bar will not be imposed. Similarly, if a request is made prior to the direction of the vote, as was the case with the earlier application in the matter before this Board, the Board will not impose a bar. When a representation vote has been directed, but not held, and the applicant seeks leave to withdraw its application, the Board will dismiss the application without imposing a bar. It will, however, draw the attention of the parties to the *Mathias-Ouelette* decision. (In this respect see the Board's practice note #7 item 6 in its Rules of Procedure.) This has the effect of putting an applicant on notice that a future application made within six months could be barred if the applicant had been motivated to seek the withdrawal by fear of an election defeat. When, however, the request is made following the vote, the Board will impose a bar. In that situation, absent any special circumstances, the Board holds that a trade union should not be permitted to avoid the risk of defeat inherent in a representation vote.

7. It might be argued in this case that, since the vote has not been counted, the *Mathias-Ouelette* rule should apply. The clear circumstances of the case, however, are as follows. Within a space of two months there were two directions for votes to be held. A vote was held as a result of the second direction with the attendant disruption of the work place. The applicant had the opportunity to seek leave to withdraw its application either before the vote was directed, or after it was directed and before it was held. In either case, it is likely that the Board would have followed its usual practice and not have imposed a bar. The applicant, whatever its reasons, chose to wait until some five weeks after the vote was held to submit its request. These are not special circumstances which would cause the Board not to exercise its discretion to apply a bar. Rather it would not be unreasonable for the Board to conclude that to not impose the bar would be to permit the applicant to avoid the risk of defeat.

8. In the result the Board denies the request and dismisses the application. The Board will not entertain an application for certification by the applicant in respect of any of the employees in the bargaining unit within the period of six months from the date hereof.

0205-79-U Canadian Paperworkers Union and Holland Landing Local 1150 of The Canadian Paperworkers Union, (Applicant), v. Cameron Packaging Inc. and Hugh T. Cameron, (Respondents).

Lock Out – Practice and Procedure – Strike – Application for strike declaration raised in reply to lock-out declaration application – whether permissible – suspension of employment occurring after negotiating committee failing to accept company offer – evidence of refusal to work overtime and production slowdown – whether motion calling for overtime ban contrary to s. 65 – whether suspension of work lock-out

BEFORE: E. Norris Davis, Vice-Chairman.

DECISION OF THE BOARD; June 1, 1979

1. The applicant alleges contraventions of section 83 of The Labour Relations Act and seeks a declaration of unlawful lockout and other remedial relief. The respondents, in their reply, allege an unlawful strike and seek a declaration of such together with a cease and desist order. The Board issued its decision on May 14, 1979 with written reasons to follow, which reasons are now provided.

2. The respondents, in their reply, alleged inter alia, the participation of unnamed employees in an unlawful strike and sought appropriate relief against such employees. The Board struck out that section of the reply on the grounds that the individuals who allegedly were in contravention of the Act, and against whom relief was sought, had not been joined as parties and had received no notice of the proceedings and the Board was therefore without jurisdiction to entertain the issue.

3. The applicant, by way of preliminary objection, took the position that it was not open to the respondent to raise the issue of a contravention of section 65 of the Act by the applicant by way of its reply in these proceedings. The applicant argued that the matter could only have been properly brought before the Board by the filing of a separate application in Form 22 as provided by the Rules. The Board, having regard to the fact that the applicant had been placed on notice by way of the reply of the respondent's claim, and the fact that particulars provided by the respondent in response to the applicant's allegations were also the particulars on which it would reply in respect to its claim for relief against the applicant, was of the opinion that the failure to initiate the proceeding by way of a separate application was not fatal to the respondent's claim. In proceedings of this nature, the Board takes the view that it is in the interests of sound industrial relations that the issues be tried as expeditiously as possible. There being no prejudice to the applicant in this case by virtue of the manner in which the respondent chose to proceed, the Board entertained the respondent's claim.

4. The respondent company and the applicant have been in negotiations for renewal of a collective agreement. There is no dispute that, following the issuance of a "No Board Report" the parties would not be in a position to legally resort to economic sanctions before May 10, 1979. There is no dispute that a total suspension of employment was initiated by the employer as of April 30, 1979. The applicant's position is that this suspension of employment constitutes a lockout under the Act and by virtue of its untimeliness is unlawful. The

respondent's position is that it had been subjected to serious deterioration of productivity, excessive waste, damage to equipment and materials and concerted refusal of overtime which rendered the continuance of production not viable, and for those reasons it suspended operations.

5. Mr. Hugh T. Cameron, President of the respondent employer and also a respondent, testified that on Saturday, April 21st he learned the results of a union meeting held that day. The evidence establishes that, at this meeting, a strike vote was conducted and carried, and that a motion was introduced from the floor and approved that employees would not work overtime except where the collective agreement specifically required overtime, and, in the case of truck drivers where necessary to complete runs.

6. On Monday, April 23rd, between 7:00 a.m. and 8:00 a.m., John Kent, Plant Superintendent, was approached by an employee, Scierri, who informed Kent that he would not be able to work overtime because he was afraid of damage to his truck. Scierri is employed as a die-mounter and almost as a regular practice had been working 2-3 hours of overtime daily. Kent then approached another employee, Kampala, and asked of him whether "he was of the same feeling that he wouldn't be able to work overtime" to which Kampala responded, "definitely yes" and stated that he had a new car and wanted to keep it that way. Kampala is employed as a starchman and in the preceding three weeks had averaged 25 hours of overtime per week.

7. The nature of the duties of Kampala and Scierri are central to the operation of the plant and their imminent refusal to work overtime would impede production and was the subject of discussion between Kent and Cameron some time before 8:00 a.m. that day. Flowing from that discussion Cameron instructed Kent to keep Scierri (whose duties normally brought him into the office during the day) out of the office and to similarly exclude from the office another employee, Munro, employed as a janitor. Cameron states that his rationale for the instruction was that it would protect those employees against any suspicion of carrying messages. Cameron also states that he counter-manded the instruction on Wednesday, April 25th, and apologized to both individuals.

8. By next morning of April 23rd, Cameron also learned of the operating results for the first two weeks in April which he characterized as being "very bad". Throughout that day there appears to have been discussions, off and on, between Cameron and a consultant, Hurrel, and between Cameron, Kent and Hurrel. Hurrel has had long experience in the paper industry and appears to have been in the plant almost daily during the month of April. A discussion was had between Cameron, Hurrel and Kent which centred on the collective agreement and in which the opinion was voiced that the overtime ban was illegal and Kent was instructed to contact Henry Arts, President of the union. Also during April 23rd, Cameron stopped all rail shipments and banned in-coming paper deliveries and started thinking about alternative production arrangements through shifting production to another plant operated by the Company and also to other manufacturers. Cameron instructed Kent to update the list of employee names and addresses. There was no direct evidence as to the underlying reasons for these actions beyond Cameron's statement that he was "keeping all his options open" and it is a reasonable inference that he was taking defensive measures against the probable implementation of the April 21st strike vote. The evidence is not clear as to when arrangements were completed for the Company negotiating team to meet with the union, but as of April 23rd, Cameron was aware a further meeting would be held on April

27th. Cameron testified that it was on the evening of April 23rd, on the way home with his daughter that he first voiced the thought of himself closing the plant, as being the only answer to his problems.

9. On April 24th, Cameron was not in the plant but, amongst other things, met with his bank and finalized a line of operating credit which he had been seeking for some months and which was only now coming to a successful conclusion. He states that this is the first time the bank was informed that the Company was in labour negotiations and might be faced with a strike. On this day, Kent spoke to Arts and asked how he could justify and allow people to totally refuse overtime. Arts response was that the union had a Constitution and it was his responsibility to uphold it. Arts stated that they had taken a vote on Saturday and decided they would work no overtime whatsoever, and under the Constitution he would uphold their decision. Kent informed Cameron of this discussion on the evening of April 24th.

10. On April 25th, Cameron had become "fed up" and spent some time in the plant letting it be known to some employees that he considered they were "fucking the dog". Cameron asked two employees individually to work on April 28th with the inventory and met with refusals: one employee said "he couldn't" and the other that he had to take his wife to an auction or art gallery. Also, on April 25th, Kent asked Butler, the Receiver, who normally assisted in inventory, to help on April 28th and Butler replied that "he would like to but he couldn't and that he wanted to stay out of trouble".

11. On the same day Cameron discussed the situation with Gibson, Vice-President of Finance and told him he had "just about had enough" and intended to close the plant. Gibson is said to have disagreed with the decision. Cameron instructed that envelopes be addressed to employees and put through the postage meter with a date stamp of April 28th. Cameron's explanation of the April 28th date was that he was thinking of communicating the reasons for shutting down the plant, and that the inventory scheduled for April 28th was a year end inventory which would be supervised by the auditors and, as such, was very important to the Company in respect to certain financing.

12. On April 26th, Cameron examined the collective agreement in detail. He states he felt he was being badly treated and that the employees were getting bad advice from Gallie, the International Representative and from Arts. From his examination of the "No strike - No lockout" clause he concluded that this was a balancing clause and that a lockout would be "tit for tat".

13. April 27th started out with a breakdown of the corrugator which Cameron in his opinion attributed to wilful negligence of the operator, Emmel. In Cameron's words, "Emmel was a good operator and it was strange a missed splice would become that major". Whatever the reason for the breakdown, we are satisfied from the testimony of Emmel and McGruthers that Emmel was not the operator at the time and that indeed the breakdown had occurred on the shift preceding that on which Emmel worked. McGruthers, the sole maintenance mechanic, worked on the breakdown of the corrugator starting at 7:00 a.m., and was of the opinion that there was a bounce in the top roller which in his view was indicative of a bad bearing and conveyed his opinion to the pro tem supervisor of maintenance, McElroy, who was of the opinion that it was more likely to be caused by air pressure.

14. Between 1:45 p.m. and 2:15 p.m. April 27th, McGruthers responded to a request from the shift supervisor to check an oil line on the corrugator and, on checking, found no oil coming through to the bearing. Further checking revealed that the line had been rubbing against the pre-heater and a hole had worn through the line, which McGruthers corrected. The corrugator again stopped between 4:00 p.m. and 5:00 p.m. caused by a seized bearing. Testimony was given by Kent that he had been told by McElroy that McElroy had discovered a kink in the oil line which would have resulted in shutting off oil to the bearing: McGruthers testified that when he finished working on the line around 3:00 p.m. April 28th there was then no kink in the line. McGruthers was unable to form an opinion at the hearing from the photograph available as to whether the kink was such that would have shut off the oil and offered a possible explanation that the kink could have occurred as a result of the housing covering the bearing having been raised up against it. McGruthers also agreed that it would have been possible to have manually produced the kink.

15. It was these production events which Cameron states were the last straw in triggering the decision to suspend operations. In the meantime, negotiations continued during the day till late afternoon when they terminated without an agreement. Cameron testified that he and Hurrel had been on the phone several times during the day with the Company negotiating team, and had learned of the end of the meeting about the same time as the equipment problems in the plant. It was testified that there had been other occasions on which a bearing had burnt out, and when Cameron was asked if he considered this specific incident as intentional sabotage, he replied, "Not really. It was the normal goofing off we had been getting". The reasons for the breakdown was not available to Cameron until May 2nd and whether it was caused by "employees goofing off" or by the failure earlier in the day of the pro tem maintenance supervisor to recognize an impending problem are inferences which can be equally drawn.

16. It was around 6:00 p.m., April 27th that Cameron advised Kent that he was going to close the plant. As to whether the decision was related to the results of negotiations Cameron testified, "if they had settled I don't think I would have closed the plant, but other than that it didn't matter a damn I had already made up my mind. I had read the contract with Hurrel Monday morning, and as far as I was concerned it was tit for tat", and also "in my mind I concluded the people were being misled by Hank (Arts) otherwise there wouldn't have been damage and slow-down. I felt people had broken forth and was very hurt to think this was happening to me".

17. On the morning of April 28th, the decision to close the plant was announced to the supervisors by Cameron because of damage and low productivity. The word "lockout" was not used. Cameron instructed the group to make sure the plant was well protected and to be sure no one was hurt or property damaged. A letter to employees was prepared and mailed, the context of which is as follows:

"To All Holland Landing Employees,

Regretfully, effective Sunday April 29, 1979 at 11:00 PM you are locked out of the Holland Landing plant of our company.

This decision was made necessary by the following actions:

- Waste increased substantially above industry standards

- Production dropped to an unacceptable level
- Company property has been needlessly damaged.
- All overtime was refused as a result of threats of personal violence and automobile damage if you worked overtime. Intimidation of this magnitude is against the law and cannot be condoned.

Our company made a serious attempt to reach a settlement on Friday, April 27, 1979 with your negotiating team. Negotiations broke in the late afternoon.

Our offer was a serious offer. It was a big improvement over the previous offer.

WAGES: May 1, 1979 to April 30, 1980: 7-½%, general increase
 May 1, 1980 to October 31, 1980: 2-½%, general increase
 Plus \$100 per man in lieu of retro-active pay.

DENTAL PLAN: To be introduced January 1, 1980, a plan which would pay 50%, of all dental expenses except orthodontia. Premiums to be shared 50:50 by employees and company.

PENSION PLAN: The company has indicated willingness to commit to the introduction of a basic pension plan, on terms to be negotiated on July 1, 1981.

SHIFT PREMIUMS: Afternoons: 19¢, Nights: 25¢ from May 1, 1979

This offer was rejected as unacceptable by your negotiating committee.

Based on the above, I made the decision to lock you out.

I am available and willing to talk to any of you about this lock out and can be reached at 775-7133.

Yours truly,

Hugh T. Cameron, (Signed)

President,

April 28, 1979.”

Cameron states that the reference to the Company's offer in negotiations was conceived and drafted by Gibson who led the Company negotiating team, and the invitation to employees to phone in regards to the lockout had been inserted at the suggestion of Cameron's son-in-law not employed by the Company. Cameron himself wrote the remainder of the letter and it is this part which he states were his real reasons for closing.

18. The Board received considerable evidence which established that the level of productivity during April was at a lower level than in March, and that in process waste was at a higher level in April. The evidence also was that damage to raw materials occasioned by carelessness and to building doors by fork lifts were probably greater than normal.

19. In our view the evidence presented to the Board fell short of establishing a concerted slow-down. The Board has before it production and waste statistics for the months of March and April but no statistics as to prior months. It was established that there has been a general price increase announced during March and that the orders booked during the first week of April were below normal, and, while there was no direct testimony relating the March production and orders to preceding months it is a fair inference that there would be a push by customers to "beat the price increase". It is also clear from the evidence that production output has been a concern of the respondent well before April. In October 1978, Cameron testified that he held employee meetings with all shifts in which he exhorted employees to increase production, and sought their suggestions for the lack of response. The Board, in the circumstances, is not satisfied on the evidence before it, that the two month comparison is adequate for the drawing of valid inferences.

20. It is also obvious that there are factors additional to employee input which influence the ultimate production level obtained. Certainly one of these factors is the condition of equipment and its servicing. The evidence establishes that the respondent has been, since October 1978, bringing a new plant at Wheatley, Ontario into production. The normal head of maintenance at Holland Landing had been appointed in January, 1979 and has been absent from Holland Landing and was performing full-time duties at Wheatley, for at least one month before these events. Cameron's brother-in-law was asked to come in and help in a supervisory capacity, apparently early in April and that was a temporary arrangement. During April, the Maintenance Department consisted of McElroy as a temporary supervisor, and a mechanic, McGruthers. This contrasts with a complement of three mechanics and a full-time supervisor a year ago.

21. It must also be noted that Hurrel, the consultant, was in the plant almost daily in April and, amongst other things did hold some meetings with employees including one such on April 23rd. Kent testified that Hurrel had commenced employee meetings in March, in respect to ways of improving the efficiency of the corrugator operation. There was no evidence that such discussions in April centred on abnormal production problems, peculiar to the month of April or on excessive waste or damage to property and materials. Gallie, International Representative of the applicant further testified that the matters had not been raised with union representatives other than through the letter of April 28th and that they then came as a surprise. There was no evidence of any individual employees having been spoken to or disciplined in respect to their performance in respect to these matters other than Cameron's forays into the plant the week of April 23rd.

22. It is evident that the infusion of the overtime ban into the operations would seriously impair the operation of the plant particularly as it related to the activities of Scierri and of Kampala, who, had key operations to perform and the non-performance of which was closely coupled to the continuance of operations. It is also evident that this new factor was of prime concern and received concentrated analysis and discussions by the respondent from April 23rd on and that it was responsible for several production stoppages that week due to lack of starch.

23. The issue to be decided by the Board is, whether the suspension of employment was basically a defensive measure by the respondent taken to protect itself against the continuance of an uneconomic operation brought about by decreased employee performance and so protected by section 68 of the Act, or whether the action was taken with a view to compel or induce his employees "to agree to provisions or changes of provisions respecting terms or conditions of employment" and so falling within the prohibition of section 63(2) of the Act.

24. The announcement to employees of the suspension of employment in the letter of April 28, 1979 clearly linked the Company's last offer and its rejection by the union as one of the reasons for closing the plant. Although Cameron states that the purpose was not to have the employees bring pressure on their bargaining committee to accept the Company's offer, he also states that he felt employees did not know what was going on in negotiations and that as a result of the letter the employees would talk about it. The objective conclusion must be drawn that an employee recipient of that communication would inevitably conclude that his bargaining committee's rejection of the Company proposal was a factor leading to the Company's decision to close the plant. The use of the term "lockout" in the letter came about, in our view, after a thorough consideration of the "No strike - no lockout" clause, on April 23rd, and leading to the view by Cameron that the union's ban on overtime was in effect, an "illegal strike" to put pressure on the Company in negotiations, and the reciprocal of that i.e., a lockout would merely be "tit for tat". The early selection of April 28th (the day following the known negotiating meeting) prior to the plant events of April 27th, is consistent with a finding that failure of negotiations to arrive at an agreement would result in implementation of the decision. The problem facing the Board is whether the purpose of the suspension of operations was solely a defensive one of not continuing in the face of obstacles and uncertainties, or whether it was with a view to compel or induce the employees to agree to provisions or changes in provisions respecting terms or conditions of employment. The letter of April 28th by outlining the respondent's last offer and its rejection by the bargaining committee and directly identifying this as one of the reasons for the suspension of employment must lead to a conclusion that part of the purpose at least was to induce acceptance of the revised terms or conditions of employment offered and so bringing the action within the definition in section 1(1)(i) of the Act. Also, as will be later discussed, the suspension of employment in order to bring an end to the overtime ban was using the suspension for the purposes of compelling employees to agree to a change of a term or condition of employment implied into their contract of employment by virtue of The Employment Standards Act, which in itself brought the action within the definition of an unlawful lockout.

25. Subsequent to the suspension of employment the union filed a grievance on April 30th to which the Company responded by telegram on May 1st proposing a meeting on May 2nd and re-stating its reasons for suspension of operations as those outlined in the letter of April 28th but without reference to the contract renewal negotiations. The meeting between Company and Union representatives did take place on May 2nd without resolving the grievance.

26. For the above reasons, the Board concluded that the respondents contravened section 63(2)(b) of the Act in suspending employment.

27. Gallie testified that at the union meeting of April 21st the vote in respect to over-

time practices came about at the result of a number of questions and complaints from the floor about "all the overtime being requested prior to negotiations". That the motion was reworded a number of times so as not to cover situations where overtime was specifically required by the collective agreement and in respect to completion of schedules by truck drivers. According to Gallie, the motion could be summed up as being that the contract contained a voluntary clause and that people should not volunteer for overtime in view of the lateness of negotiations. The motion was carried. The testimony of Kent relative to his conversation with Arts about overtime and of Emmel, confirm Gallie's testimony.

28. Kent and Cameron testified that the respondent was not in possession of any permit permitting an exemption to the prohibition of section 17 of The Employment Standards Act. That section reads:

"17. Except as otherwise provided in this Part, and subject to any schedule in force under *The Industrial Standards Act*, the hours of work of an employee shall not exceed eight in the day and forty-eight in the week."

By section 20 of that statute discretionary authority is vested in the Director to "issue a permit authorizing hours of work in excess of those prescribed by section 17" which, except for certain named occupations which are not here relevant, cannot exceed a total of 100 hours in the year.

29. The applicant argues that, in the absence of overtime permits, the effect of the union's decision not to work overtime is no more than to enforce compliance with The Employment Standards Act. There was no evidence that the union's action was in any way initially motivated by a desire to abide by that statute. That Act imposes both daily and weekly limits on hours of work of an employee, and the facts of the case before us are that, at least in respect to Scierri and Kampala the employer's requirements were for daily overtime in excess of eight hours which would be in conflict with section 17 of The Employment Standards Act in the absence of a permit having been issued. There was also evidence that overtime work was required for a sixth day of operation which could be within the permitted weekly hours of work without any permit requirement. In our view it is not necessary to establish a contravention of section 65 of the Act that a strike actually take place. It is the "calling or authorizing" which is itself the offence. Nonetheless we do note in this case that, the evidence does support a conclusion that overtime work which would exceed the daily limit of eight hours as well as overtime work which would be within a weekly limit of 48 hours, was in fact refused and that such refusal was not based on reasons personal to the individual but in concerted compliance with the decision taken by the union.

30. It is our finding that the motion approved at the union meeting on April 21st was intended to cover all overtime work whether or not such work was in contravention of The Employment Standards Act and that therefore the applicant union did call or authorize a strike within the meaning of section 1(1)(m) of The Labour Relations Act contrary to section 65 of the Act, to the extent that such overtime work did not exceed the maximum hours permitted under The Employment Standards Act. (*See C & C Yachts Mfg. Ltd.* [1977] OLRB Rep. July 433).

31. There is the further question which arises in this case of whether refusal by em-

ployees, in concert, to work hours in excess of 8 hours per day, in the absence of a permit issued by the Director of Employment Standards to do so, constitutes an activity proscribed by The Labour Relations Act.

32. As was said in the *C & C Yachts* case, “the setting of maximum hours of work in the day or the week is a matter of public policy. That policy is enforced by rendering both employers and employees liable to prosecution for sponsoring or performing work in excess of the maximum hours”. In our view The Labour Relations Act must be interpreted to be consistent with this announced public policy, and it would be patently absurd for us to find that refusal to engage in conduct, which would be in breach of The Employment Standards Act if engaged in, should nonetheless be considered a breach of The Labour Relations Act. When the Legislature defined “strike” as it did in section 1(1)(m) of the Act it can only have been referring to actions which would be lawfully permissible save for the fact that they are undertaken “in combination or in concert”. Under the circumstances of this case the employer was precluded by law from requiring employees to work in excess of eight hours in any day and the refusal by employees to do so cannot be used to be found a contravention by them of The Labour Relations Act.

33. The limitation on working hours is an “employment standard” under The Employment Standards Act and, as such, is imported into the contract of employment as an implied term or condition of employment, and which by section 3 of that statute cannot be waived or contracted out of. The evidence is, in the present case, that the overtime ban by the union which in part constituted an unlawful strike (as discussed above) cannot be similarly construed in respect to daily overtime particularly as it affected Scierri and Kampala which posed a major operating problem to the respondent. The respondent by suspending operations in order to, amongst other objectives, eliminate the overtime ban was, in effect, using that suspension to change the terms or conditions of employment relating to daily overtime.

34. The Board notes that at the time it issued its declaration of May 14th, the suspension of employment had, by the effluxion of time, matured into a legal lockout and that by virtue of the suspension of employment the union call for refusal of overtime obviously was then having no continuing impact. The Board was of the opinion that it should exercise its discretion in favour of issuing declarations in order to more adequately inform the parties as to their rights and obligations.

0065-79-R Comco Employees Association, (Applicant), v. Comco Metal & Plastic Industries Ltd. (Respondent).

Certification – Membership Evidence – Trade Union Status – 3 member committee forming association and signing constitution – Others paying “dues” before constitution signed – committee members acting as officers – no membership documents signed – Whether trade union

BEFORE: R. O. MacDowell, Vice-Chairman and Board Members F. W. Murray and W. F. Rutherford

APPEARANCES: *Raymond Walton, Mabel Vader and Bob McDonald for the applicant; Robert McComb and G. V. Hawker for the respondent.*

DECISION OF THE BOARD; June 5, 1979

1. This is an application for certification. The applicant employee organization has never previously appeared in any proceeding before the Board and, accordingly, is required to establish that it is a “trade union” within the meaning of section 1(1)(n) of The Labour Relations Act. Mr. Raymond Walton, an officer of the applicant, gave evidence concerning its origins.
2. In the fall of 1978 some of the employees of the respondent were approached by another trade union and it was this event which crystalized the desire to transform the existing uncertified employee association into a trade union. A meeting was held on December 17th in order to ascertain whether the employees approved of this course of action. The meeting was well attended, and the employees decided that the existing committee should make further enquiries and take such steps as were necessary to re-organize the association, establish a form of membership card and choose a name. It was decided that a \$5.00 voluntary donation would be collected starting January 12, 1979, which would be used to defray any expenses incurred in pursuing the formation of a “union.” In January, February and March a number of voluntary payments were, in fact, made, and a receipt was issued which was signed by the various employee contributors. It will be observed that at this time there was no trade union organization in existence, and that these payments were not made in respect of the initiation fees or monthly dues of any trade union; rather, they were collected to defray the expenses of creating such organization. These are the only documents before the Board evidencing any monetary payment and, as has already been pointed out, were not clearly referable to membership in any organization then in existence. Although membership cards were mentioned at the December 17th meeting, such membership cards have not been printed. By the date of the hearing no employee had signed any application for membership, nor was there any document issued by the applicant or its officials certifying that any employee was a “member”, or had been granted membership.
3. A second meeting was held on March 18th, 1979 to consider a constitution which the committee had prepared with the assistance of a solicitor. This constitution was read out and explained to the employees who attended the March 18th meeting. No one objected to it. The constitution has some unusual provisions, but the document clearly establishes that the objects of the association include collective bargaining, and that there are responsible “directors” of the organization to carry on its business. Certain employees were nominated and there was a purported election of officers. However, there is no evidence before the

Board that any of the employees present at the meeting ever enrolled as members of the new organization, or became members by signing membership cards, or otherwise individually and unequivocally signified their intention to become members of the new organization. This may not be fatal to a finding of trade union status, however, because the constitution recognizes that the affairs of the association can be managed by a *pro tem* committee of three employees until such time as persons can be enrolled into membership and an election can be held. The *pro tem* committee of three employees signed the constitution document and undertook to carry out their responsibilities thereunder. It was these employees who had been instrumental in re-organizing the association and it was they who appeared before the Board on behalf of the applicant.

4. The requirements for trade union status have been set out in a number of Board decisions, most recently in *Associated Hebrew Schools of Toronto*, [1978] OLRB Rep. Sept. page 797. In that case, the Board was unable to find status, but in reaching that decision made the following comments on the nature of the problem:

“9. Section 1(1)(n) of The Labour Relations Act defines a trade union, in part, as ‘an organization of employees formed for purposes that include the regulation of relations between employees and employers ...’ Such an organization is entitled, if it otherwise qualifies, to be certified, to negotiate collective agreements and generally to exercise the rights of a trade union under the Act. The Board, in seeking to determine whether an applicant before it is a trade union, requires that it be more than just an informal joining together of individuals. Instead, the Board requires that the applicant be a formal organization whose members have bound themselves together on the basis of specific terms for purposes that include the regulation of relations between employees and employers. The decision of the Supreme Court of Canada in *Orchard v. Tunny* (1957) 8 D.L.R. (2d) 273 and of the Ontario Court of Appeal in *Astgen v. Smith* (1967) 7 D.L.R. (3d) 657 indicate that the essence of a trade union is a group of individuals who have entered into a contractual relationship one with the other, the terms and conditions of which are provided by the union’s constitution. In *Orchard v. Tunny* Rand J. in delivering the majority decision of the Court stated at p.281:

‘Apart, then, from statute, that a union is held together by contractual bonds seem obvious, each member commits himself to a group on a foundation of specific terms governing individual and collective action ... and made on both sides with the intent that their rules shall bind them in their relations to each other. That means that each is bound to all the others jointly.’

In *Astgen v. Smith* Mr. Justice Evans in giving the majority decision of the Court made the following statements concerning the International Union of Mine, Mill and Smelter Workers at p. 662:

‘Mine Mill is not a corporation, individual or partnership, and is accordingly not a legal entity; it is an unincorporated group or association of workmen who have banded together to promote certain objectives for their mutual benefit and advantage and in

law nothing is recognizable other than the totality of members related one to another by contract. The objects and purposes of the association are spelt out in the memorandum of association usually referred to as the 'constitution', the by-laws or rules provide the machinery for the proper carrying out of activities intended to advance the objectives and purposes of the voluntary association. Each member of Mine Mill, upon being granted membership, subscribed to those purposes and objects and in so doing entered into a contractual relationship with every other member of the Mine Mill.

I adopt also the proposition stated by Thomson J. in *Bimson v. Johnson et al* [1957] O.R. 519 at p.530, 10 D.L.R. (2d) 11 at p.22, which was affirmed on appeal [1958] O.W.N. 217, 12 D.L.R. (2d) 379: '... that a contract is made by a member when he joins the union, the terms and conditions of which are provided by the union's constitution and by-laws... The contract is not a contract, but rather the contractual rights of a member are with all other members thereof.'

10. Once a trade union has come into existence it is a relatively simple matter for others to become members of the organization and thereby enter into a contractual relationship with the existing members. When a new member joins, however, he does so on the basis of a pre-existing constitution. He knows (or at least should know) that it is a trade union which he is joining, that he is entering into a contractual relationship with the other members of the union and that the terms of that relationship are as spelt out in the union's constitution. The more difficult procedure to accomplish is for a group of employees to create a trade union where none has existed before. This process must involve not only the settlement of the terms of a constitution for the union, but also the taking of steps which make it clear that the individuals involved have actually entered into a contractual relationship one with another on the basis of the terms set forth in the constitution.

11. The Board has in a number of cases indicated a series of steps which will generally be sufficient to insure that a trade union has been brought into existence. See, for example, *Local 199 U.A.W. Building Corporation* [1977] OLRB Rep. July 472.

These steps may be summarized as follows:

1. A constitution should be drafted setting out, among other things, the purpose of the organization (which must include the regulation of labour relations) and the procedure for electing officers and calling meetings.
2. The constitution should be placed before a meeting of employees for their approval either as originally drafted or as amended at the meeting.

3. The employees attending the meeting should be admitted into membership. In this regard it is well to keep in mind section 1(1)(j) of the Act which defines a union member to include a person who has applied for membership in the union and on his own behalf paid to the union at least \$1.00 in respect of initiation fees or monthly dues.

4. The constitution should be ratified by a vote of the members.

5. Officers should be elected pursuant to the constitution.

12. As indicated above, the great majority of the membership applications filed in these proceedings are dated prior to the adoption of the constitution. Thus it cannot reasonably be said that the employees at the time that they signed these applications were agreeing to become contractually bound one to another in that the terms of such a contractual relationship simply did not exist. Further, the fact that at the same time that these applications for membership were signed the employees also signed receipts in the name of the applicant, albeit for money payments apparently destined for the Alliance, suggests that some of the employees may well have been of the view that no differences existed between the Alliance and the applicant. A constitution was adopted at the meeting on December 14, 1977. However, at that meeting no one joined the applicant or re-adopted membership applications executed earlier. In short, while the people present at the meeting seem to have decided upon the terms of a constitution for the applicant, there is no evidence that they individually adopted the terms of the constitution as the basis of a contractual relationship one with another. In these circumstances there could not have been a ratification of the constitution by actual members of the applicant.”

5. The facts of the present case are, of course, different from those before the Board in the *Hebrew Schools* case. We are satisfied that, notwithstanding the problems concerning membership in the association, there is sufficient evidence of an “organization of employees formed for the purposes that include collective bargaining” to justify a finding that the applicant is a trade union within the meaning of the Act (although it would appear that at the present time, the organization consists only of the members of the *pro tem* committee.)

6. The applicant must still demonstrate that it has sufficient support to warrant either automatic certification or the taking of a representation vote. Such certification has important consequences both for the trade union and the employees whom it represents. Once certified, the trade union becomes the exclusive bargaining agent for the employees in the bargaining unit, and the union must represent all of such employees, whether or not they are members. Once certified the employer is prohibited from negotiating with individual employees in order to determine their wages and working conditions and, likewise, an employee cannot bargain directly on such matters with his employer. Once certified, a trade union remains the bargaining agent for the employees until its bargaining rights are terminated, and such opportunity may (depending upon the term of any negotiated collective agreement) be postponed for up to four years. It is, therefore, quite possible that a certified organization can retain its status as exclusive bargaining agent for some considerable period of time and that during this period, dissatisfied employees will not have an opportunity to

oust their existing bargaining agent or select another one. It is for this reason that the Board must exercise considerable care in determining whether an applicant union does, in fact, represent the majority of the employees.

7. In an application for certification the Board must, of necessity, rely heavily on *documentary evidence* of membership – which is, of course, written hearsay. By virtue of section 100 of The Labour Relations Act such evidence is secret and is not subject to cross-examination by any of the parties. The Board has certain well established requirements as to evidence of membership submitted in support of applications for certification. These requirements include (with certain exceptions not here material): that applications for membership be made in writing, signed by the person said to be a member of the applicant; that each person said to be a member of the applicant pay to the applicant, on his own behalf, an amount of at least \$1.00 in respect of the prescribed initiation fee or monthly dues of the applicant; that this money payment be confirmed by a written receipt signed by the person who collected the money and countersigned by the person who paid the money, and that this evidence be supported by a declaration in Form 8 with respect to the collection of the money. By section 48(1) of the Board's Rules of Procedure evidence as to representation must be in writing and by section 48(2) of the Rules the Board is prohibited from accepting oral evidence of membership except to identify and substantiate the written evidence. The Board must be assured that the documentary evidence unequivocally demonstrates that the employees are members of the union. Membership is defined in section 1(1)(j) of the Act as follows:

“Member”, when used with reference to a trade union, includes a person who,

- (i) has applied for membership in the trade union, and
- (ii) has paid to the trade union on his own behalf an amount of at least \$1 in respect of initiation fees or monthly dues of the trade union,

and “membership” has a corresponding meaning;

8. In the present case we have before us, in addition to the receipts already mentioned, a document in the form of a petition, signed by a number of employees, and containing the following preamble:

“THE undersigned Employees of COMCO METAL & PLASTIC INDUSTRIES LTD., hereby certify that they are members of COMCO EMPLOYEES ASSOCIATION, and request that the said Association be certified as the Bargaining Agent for them.”

Although none of the signatures are countersigned by the “collector”, they were apparently solicited by Mr. Walton himself on the morning of April 3rd. The employees purport to certify that they are “members” of the organization. Some of these employees may (or may not) have been at the December meeting to discuss the possibility of forming a trade union and the March meeting, when the purported ratification of the constitution took place. The Board has no evidence as to which employees were at either meeting nor have any of the

employees signed membership cards or been formally accepted into membership. There is no documentary evidence from the applicant certifying that any employee is a member. Membership evidence in the form usually required by the Board was contemplated at the meeting of December 18th, but no such evidence was forthcoming. Section 1(1)(j)(ii) requires the payment of at least \$1.00 towards the membership dues of the applicant union; but in the present case the only payments of which there is any evidence were made (by almost all of the employees) prior to the existence of the trade union, and for a different purpose.

9. Having regard to the evidence before us, and the statutory prescriptions concerning "membership" and membership evidence, we are not satisfied that at least forty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on 18th April, 1979, the terminal date fixed for this application and the date which the Board determines, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act. In the result, therefore, this application is dismissed. However, the Board is not prepared to exercise its discretion, pursuant to section 92(2)(i) of the Act, to raise a bar to any new application. The applicant, therefore, remains free to file another certification application if it wishes to do so.

0564-79-U Mechanical Contractors Association Ontario, and Mechanical Contractors Association London on behalf of its members **Comstock International Ltd.**, Steen Mechanical Ltd., Woodcroft Mechanical Contractors Ltd., Eric Greenbeck Ltd., King Mechanical Contractors Ltd. and W. Besterd Plumbing and Heating Ltd., (Applicants), v. The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 593, K. Martin and D. Hodgins, (Respondents).

Collective Agreement – Construction Industry – Section 123 – Strike – Union bound by provincial agreement seeking supplementary local agreement – official's actions deemed union's acts – direction enjoining official and union issuing

BEFORE: Ian C. A. Springate.

APPEARANCES: *G. Grossman and J. McCarron for the applicants; no one appearing for the respondents.*

DECISION OF THE BOARD; June 28, 1979

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2. The applicants have applied for relief under section 123 of The Labour Relations Act.

3. The applicants Comstock International Ltd., Steen Mechanical Ltd., Woodcroft Mechanical Contractors Ltd., Eric Greenbeck Ltd., King Mechanical Contractors Ltd. and W. Besterd Plumbing and Heating Ltd. are contractors currently involved in construction projects in and around the City of London. Each of the firms employs tradesmen who are members of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 593 ("Local 593").

4. The applicant contractors and Local 593 are bound by a subsisting province-wide collective agreement between the Mechanical Contractors Association of Ontario and the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada.

5. The respondent K. Martin is the business representative of Local 593. Mr. Martin is somewhat unhappy with the method of calculating travel allowances provided for in the province-wide collective agreement referred to above and as a consequence he has sought to convince the applicant contractors to enter into an agreement to use a different method of calculation in the London area. Mr. Martin also appears to be of the view that pressure put on the applicant contractors may result in amendments to the province-wide collective agreement in so far as it relates to the London area. The contractors have raised Mr. Martin's views with the Mechanical Contractors Association of Ontario, but have refused to enter into any local agreement with Local 593. Mr. J. Woodcroft, the President of Woodcroft Mechanical Contractors Ltd., indicated in his testimony that at least part of the reason for this refusal was a concern that the signing of such an agreement might be unlawful. Presumably Mr. Woodcroft was referring to section 133(2) of the Act which prohibits the entering into of any collective agreement or other arrangement affecting employees in the industrial, commercial and institutional sector of the construction industry that is other than a provincial agreement.

6. On or about Tuesday, June 19, 1979, members of Local 593 began to picket the offices, but not the job sites, of the various applicant contractors. In connection with this picketing Mr. Martin publicly indicated that unless the matter of the travel allowances was settled to his satisfaction, on Thursday, June 21st, the members of Local 593 might begin to walk off the job sites of the various contractors.

7. On Thursday, June 21, 1979, members of Local 593 in the employ of Woodcroft Mechanical Contractors Ltd. commenced a work stoppage at a number of job sites. The evidence establishes that the employees involved were acting on the instructions of Mr. Martin. On that same day Mr. Martin publicly indicated that the work stoppages would continue and probably escalate until the travel allowance issue was settled.

8. On Friday, June 22, 1979, members of Local 593 who were employed on one of the job sites of Comstock International Ltd. began a work stoppage. Mr. Martin also publicly stated that he also would be removing union members from a dozen or so job sites on the following Monday.

9. On Monday, June 25, 1979, all of the remaining members of Local 593 employed in the London area by the applicant contractors joined what had in effect become a general work stoppage by Local 593 members. Some of the men returned to work at one particular job site, but that was only out of a concern that if they did not do so the work involved might be done by maintenance workers in the direct employ of the owner-client.

10. The Board finds on the evidence before it that employees of each of the applicant contractors have engaged in a cessation of work which constitutes a strike within the meaning of section 1(1)(m) of the Act. The Board further finds that this strike activity is unlawful in that it breaches the prohibition contained in section 63(1) of the Act against strikes during the operation of a collective agreement.

11. On the evidence the Board is satisfied that Mr. Martin threatened an unlawful strike, and that Mr. Martin called, counselled or procured the unlawful strike activity referred to above. The Board is further satisfied that Mr. Martin is an officer, official or agent of Local 593, and that his actions were carried out within the scope of his authority to act on behalf of Local 593. Accordingly, pursuant to section 88(2) of the Act, Mr. Martin's actions are deemed to have been the actions of Local 593. It follows that the Board is satisfied that Local 593 did call or authorized an unlawful strike.

12. In light of the circumstances set out above, the Board considers it advisable to make a direction under section 123 of the Act. The direction, however, will not refer to the respondent D. Hodgins in that the Board is not satisfied that he played any direct role in the events set out above.

13. The Board directs:

- (1) that K. Martin and the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 593, its officers, officials or agents cease and desist from counselling, supporting or encouraging an unlawful strike at the projects of the following contractors, namely: Comstock International Ltd., Steen Mechanical Ltd., Woodcroft Mechanical Contractors Ltd., Eric Greenbeck Ltd., King Mechanical Contractors Ltd. and W. Besterd Plumbing and Heating Ltd;
 - (2) that K. Martin and the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 593, its officers, officials or agents refrain from calling or authorizing or threatening to call or authorize an unlawful strike at the projects of the above named contractors;
 - (3) that K. Martin direct the members of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 593 who are engaging in unlawful strike activity against the above named contractors to cease and desist from continuing to engage in an unlawful strike.
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0131-79-R United Steelworkers of America, (Applicant), v. **Dominion Stores Limited** and Supermarket Limited, (Respondents).

Related Employer – Supermarket establishing gas station – whether union attempting to expand bargaining rights

BEFORE: E. Norris Davis, Vice-Chairman, and Board Members J. D. Bell and W. F. Rutherford.

APPEARANCES: *Brian Shell, Ron Varley and Brian McClland for the applicant; C. G. Riggs, D. P. Ward and Warren Frederick for the respondents.*

DECISION OF THE BOARD; June 19, 1979

1. This is an application for a declaration under section 1(4) of the Act.
2. The applicant is a party to a collective agreement with the respondent Dominion Stores, covering retail stores operated by the respondent in the City of Windsor, Ontario. The respondent, Supermarket, is a wholly owned subsidiary of Quintana, Inc. which, in turn, is a wholly owned subsidiary of Dominion Stores. Supermarket has been operating gasoline service stations in the province, since 1968, and two self-service stations were opened in Windsor in June 1977. It is in respect to the ten employees at these two stations that the applicant files the present application.
3. The evidence established that D. P. Ward, currently employed as Manager of Research of Dominion Stores had up to May 22, 1979 been employed as General Manager of Supermarket and as such reported to another executive of Dominion Stores who held the position of Manager of Associated Companies. Ward, then and now, maintained his office in the Dominion Stores head office and is on the Dominion Stores payroll. The directors and officers of Supermarket are employed by Dominion Stores, and one of them is an officer of Dominion. A committee of the Dominion Stores Board approves annual capital and operating budgets of Supermarket, and initial seed capital required by Supermarket was supplied by Dominion, although Supermarket for some time has been able to finance its capital and operating requirements from its own resources.
4. Supermarket is the lessee of one of the properties in Windsor, and a sub-lessee from Dominion Stores in the case of the other property.
5. An agreement between Dominion Stores and Shell Oil Co. for the supply of gasoline has been assigned to Supermarket, which operates as a consignment dealer, billed directly by Shell for product sold, and all bills are paid by Supermarket. It should be noted that Supermarket receives accounting services through a section of Dominion Stores Accounting Department, and pays its own municipal taxes, insurance, audit fees, legal fees. Supermarket has its own stationary and bank accounts; the cost of Ward's salary, benefits, and those of his secretary while paid by Dominion are charged back to Supermarket and involve an actual transfer of funds.
6. At the commencement of operations, no assets were purchased from Dominion Stores and no assets in connection with the Supermarket Windsor operation are owned by

Dominion: the gas dispensers are owned by Shell, the underground tanks are owned by Supermarket. Supermarket's sale volume is in excess of 98%, from sale of gasoline, 1%-1½%, from oil sales, ½%, in all other items including tires, batteries, charcoal etc. Items acquired by Supermarket through Dominion Stores when the price is right amount to .02%, of the total.

7. There is a rotating sign at each of the gas bars bearing the Shell logo on one side and the Dominion Stores logo on the other side. Streamers of flags bearing the Dominion logo are used over the bars, and the employees, who are paid in cash, receive their wages in an envelope used by Dominion and with the Dominion name on it and which it is explained is done as a matter of economy. Supermarket has an employment function separate from Dominion, and sets its own wage scales. The evidence was that no Dominion employees were shifted or transferred to Supermarket and that there has been no interchange or intermingling of employees of the two companies. Both gas bars are located on the edge of a parking lot surrounding a shopping centre in which Dominion operates a supermarket.

8. Supermarket currently (and for some time) provides a discount to its customers in the form of a coupon which is redeemable only in a Dominion Store. The coupon bears no Supermarket identification but is dominated by Dominion identification, and the cost of coupon redemption is shared equally by the two companies. The coupon is designed to promote sale volume for both companies. The locations of outlets generally are close to a Dominion Store (in Windsor on the shopping plaza parking lots).

9. Supermarket accepts a number of credit cards for which it pays a service charge except in the case of the Shell card. All gas and oil sold at these locations bears the Shell name. While Dominion sells oil in its stores, no Shell oil is sold, and while both companies sell charcoal briquets, Supermarket makes no attempt to be competitive in that area.

10. Mr. Ron Varley, President of the applicant and an employee of Dominion Stores testified that he first became aware of the merchandising coupon with Dominion Stores in November 1978, and that prior to that time he had had no consciousness of Dominion's interest in Supermarket. Varley raised Dominion's involvement with the local Personnel Manager and states that he received a later reply that there was no connection with Dominion. He raised the matter with Dominion's Labour Relations Manager in January 1979 and states he was told there "was no connection whatsoever". He asked the District Union office for research assistance and subsequently filed a grievance which is currently scheduled for an arbitration hearing.

11. The applicant argues that there here exist related or associated activities by corporations under common control or direction, such that the Board should make a declaration that the two corporations should be treated as one employer for the purposes of this Act.

12. As has been noted in past cases, the underlying purpose of section 1(4) is to preclude the erosion of existing bargaining units and of existing bargaining rights through the device of establishing an additional corporate entity as an employer. The Board has also previously noted that the section cannot be used to expand existing bargaining rights or to circumvent the certification process provided in the Act. It is therefore clear that the threshold question to which the Board must address itself, is whether the applicant can demon-

strate that it possesses prior bargaining rights which would include persons engaged in the subject activities and is only precluded from exercising such rights by virtue of the fact that such persons are legally employed by a separate corporate entity. The answer to that question must be sought in the collective agreement to which the applicant is a party and which was entered into on October 15, 1978. The relevant provision of that agreement is, of course, the scope clause which reads:

“The Company recognizes the union as the sole and exclusive bargaining agency for all employees in its retail stores in Windsor, Amherstburg and suburban area, save and except store managers, assistant store managers, department managers, bookkeepers, and persons above the rank of assistant store manager.”

13. The applicant, in connection with the interpretation of the words “retail stores” refers us to a judicial decision which found that in respect to a specific building restriction a “gasoline station” was to be held to be a “store”. See *Re Longley* (1928), 34 O.W.N. 181. We are also referred to a Court of Appeal decision in *Re Domestic Storage and Forwarding Co.*, [1932] O.R. 350, which followed the interpretation established by *Re Longley* and again involved a building by-law interpretation. It may be, that, in the context of a specific building by-law, it is clear that a “gasoline station” is to be treated as a “retail store” but the question before us is whether the parties to the collective agreement so intended.

14. In our view, the use of the words “in its retail stores” must be intended to mean retail stores of Dominion Stores Limited of the type and kind existing at the time the agreement was executed. As of that time the only retail outlets operated by Dominion were food supermarkets and it is to these which the words must refer and which the agreement was intended to cover. A review of substantive provisions of that agreement indicate that it was in respect to the terms and conditions of employees engaged in a typically food supermarket structure that the parties directed their total attention. The operation of a gasoline service station is not a normal or natural extension of the business or activities involved in the retail food business. Had Dominion Stores Limited itself engaged in the operation of gasoline service stations it is our view that persons so employed would not have fallen within the scope of the applicant’s present bargaining rights.

15. In view of that conclusion it is not necessary to consider further whether the facts of this case meet the requirements of section 1(4) which are precedent to the Board exercising its discretion.

16. The application is dismissed.

0001-79-R Public Service Alliance of Canada, (Applicant), v. Forintek Canada Corp., (Respondent).

Certification – Membership Evidence – Trade Union Status – members enrolling prior to employment – whether affecting validity of membership evidence – constitution permitting Board of Directors to accept employees as members – employees eligible for membership

BEFORE: E. Norris Davis, Vice-Chairman, and Board Members C. G. Bourne and O. Hodges.

APPEARANCES: *Michael Gleeson for the applicant; A. D. G. Purdy and Stephen Luff for the respondent.*

DECISION OF THE BOARD; June 27, 1979

1. The name: “Forintek Canada Corporation” appearing in the style of cause of this application as the name of the respondent is amended to read: “Forintek Canada Corp.”
2. This is an application for certification.
3. The applicant has not previously appeared before this Board and is required to establish its status as a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.
4. The applicant has been in existence for some time with a membership of approximately 190,000 and is a party to collective agreements with the Federal Government under the *Public Service Staff Relations Act*, and with Crown Corporations and/or agencies, as well as agreements covering employees other than Federal Crown or Federal Crown corporation employees. A copy of the union’s constitution was filed with the Board, together with a list of current officers.
5. The Board finds the applicant to be a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.
6. The applicant has applied for a bargaining unit described as:

“All employees of Forintek Canada Corp. in Ottawa, Ontario, save and except Deputy Director and those above the rank of Deputy Director, and secretaries to the Director and the Deputy Director.”

The respondent seeks the exclusion of “Section Managers and those above the rank of Section Manager, secretaries to Section Managers and personnel clerk, and persons regularly employed for twenty-four hours per week or less and students employed for the summer vacation”. Mr. C. Robicheau, Labour Relations Officer, is appointed to examine into the duties and responsibilities of persons employed in the classifications sought to be excluded by the respondent, and to report to the Board thereon. Pending the receipt of the Officer’s report and a final determination by the Board in respect to the disputed classifications, the Board finds the unit applied for by the applicant to be the appropriate bargaining unit.

7. The respondent raises a question as to the validity of the evidence of membership filed by the applicant in view of the fact that applications for membership were accepted prior to the individuals in question having actually entered the employ of the respondent. The respondent raises a further question that the employees concerned in this application do not qualify for membership in the applicant under the applicant's Constitution.

8. The Board was told, and it was not disputed, that at least some, if not all, of the employees herein involved had been employees of the Federal Government in the Department of Fisheries and the Environment, prior to April 1, 1979. They were employed within a group known as the "Eastern and Western Forest Products Laboratories" and engaged in research operations. At that time, these individuals were members of the applicant and represented in bargaining by the applicant.

9. Consequent to a decision taken by the Federal Government to "privatize" this operation, letters patent were issued February 9, 1979 setting up the respondent, as a non-profit foundation, without share capital, and active operations were commenced April 1, 1979. The employees with whom we are here concerned work out of premises leased by the respondent in Ottawa. The respondent is involved in forest product research and its objective is to carry through research projects on behalf of industry as well as provincial and federal governments. Currently, it has a contract for \$2,300,000.00 together with on-going commitments from the Federal Government, and anticipates an agreement with the Province of British Columbia in the amount of \$1,500,000.00, and is in early stages of negotiation for similar research contracts with the industry representatives and with the provinces of Ontario and Newfoundland.

10. As to the respondent's argument that the Board should not accept as evidence of membership, application cards signed prior to entering into the respondent's employ, we are of the opinion that the argument must fail. It appears that these individuals were made aware by their then employer of the fact that, as a result of that employer's decision, the individuals would have their employment transferred to a new employer, the respondent. It was in respect to such projected employment relationship that the application cards were signed prior to actual employment. Disregarding for the moment the respondent's further argument that these individuals were not eligible under the union's constitution for membership, we have no hesitancy in accepting such applications for membership. The instant case falls squarely within the reasoning of the Board in the *Canadian General Electric* case [1965] OLRB Rep. Aug. 361.

11. The respondent also raises the issue as to whether the limitations in the applicant's constitution regarding membership eligibility is such that the Board should not issue a certification in respect to the employees here concerned. The relevant clauses in the applicant's constitution are:

"Section 4

MEMBERSHIP

Sub-Section (1)

All public service employees as determined from time to time only by the Board of Directors in session, shall be eligible for membership in the Alliance.

Sub-Section (2)

Through application by a Component to the National Board of Directors, a member who has retired may be granted Honorary Membership for outstanding service to the Alliance.

Honorary members shall not be required to pay dues to the Alliance and shall not be entitled to vote at meetings or to election to office in the Alliance but shall be entitled to all other rights and privileges of membership in the Alliance.

Sub-Section (3)

The Alliance may extend recognition to honorary memberships or memberships otherwise designated, granted by any other organization upon that organization becoming a part of the Alliance.

Sub-Section (4)

A Life Membership may be awarded to any member who, through personal and devoted efforts in the affairs of the Alliance, has performed exemplary services for the membership of the Alliance, provided, however, that there shall be no more such Life Memberships at any one time than the number thereof decided upon by the National Board of Directors.

The awarding of Life Memberships shall be controlled and decided upon by the National Board of Directors which shall establish regulations to govern the award thereof."

Additionally, the applicant filed with the Board a certified copy of a motion passed at a meeting of the National Board of Directors of the Public Service Alliance of Canada, January 30, 1979 to February 3, 1979 and which reads:

"34. *INTERPRETATION SECTION 4, SUB-SECTION 1*

m/s Desrosiers and Bonin:

WHEREAS the Federal Government had decided to "privatize" the Eastern and Western Forest Products Laboratories of the Department of Fisheries and the Environment; and

WHEREAS this union wishes to continue to protect the terms and conditions of employment of our members; therefore

BE IT RESOLVED THAT the Board as authorized in Section 4, Sub-section 1 of the Constitution interpret as public service employees the employees of the Eastern and Western Forest Product Laboratories whenever these labs are "privatized" in accordance with government policy

Recorded Vote No. 102*.

The Chairman declared the MOTION CARRIED."

12. The recent (and as yet unreported) case of *Windsor Raceway Holdings Ltd.* (Board File No. 1219-78-R) provides a comprehensive review of the jurisprudence applicable. The Board there quotes with approval an outline of policy enunciated in *Zeller's Limited* [1970] OLRB Rep. Nov. 809 as follows:

“13. In dealing with the application of section 92(4) of the Act, the Board stated in *Zeller's Limited*, [1970] OLRB Rep. Nov. 809:

‘The evidence of membership filed by the applicant in this case satisfied the requirements of section 1(1)(ga) of the Act. Where, as in this case, persons are claimed by the applicant as members and the evidence of membership satisfies the requirements of the Act, the Board assumes that the union has not violated its own charter, constitution or by-laws and therefore the Board assumes that the union has the right to accept and has accepted such persons into membership under the provisions of its charter, constitution or by-laws. Of course, this assumption is rebuttable. If there is a challenge to the applicant’s jurisdiction to take such persons into membership and such challenge is supported by evidence that casts serious doubt on the applicant’s right under its charter, constitution or by-laws to take such persons into membership, the Board, pursuant to the provisions of section 77(4) of the Act, will require the union to prove that it has an established practice of admitting persons into membership without regard to the eligibility requirements of its charter, constitution or by-laws.’ ”

13. The applicant, in the present case, puts forward a number of certification orders issuing from the Canada Labour Relations Board and in which the applicant was certified for employees of the City of Yellowknife in one case, for the employees of Walpole Island Council, for the employees of the Qu’appelle Indian Residential School Council, and for the employees of Manitou Community College. These certificates do establish the applicant’s practice of accepting into membership persons who are employed other than by the Federal Crown or Federal Crown corporations and thus an expansion on the narrow interpretation of the words “public service” employees as used in the applicant’s constitution. The applicant also filed with the Board a copy of a certificate issued to it by the Nova Scotia Labour Relations Board covering employees of the Camp Hill Hospital in Halifax, N.S. although no evidence was presented as to the status of that employer.

14. The first question to be determined by the Board is whether the respondent’s challenge to the applicant’s jurisdiction casts serious doubt on the right of the applicant to take the employees, here involved, into membership. To arrive at an affirmative answer to that question would require the Board to treat the Motion #34 of January 30, 1979 to February 3, 1979, which specifically authorizes membership to be extended to these employees, as a nullity. The language of section 4(1) of the applicant’s constitution does delegate a discretion to the National Board of Directors in determination of those persons who shall be deemed to be eligible for membership, and in our view this Board should not impose its judgment in place of that of the Directors unless we were to come to the conclusion that the Directors had acted in a perverse, absurd or patently unreasonable manner.

15. Section 6(3)(a) of the applicant’s constitution sets out:

“SECTION 6

Sub-Section (3)

(a) The members of the Components listed in Subsection (2) of this Section, except the National Component, may continue to enjoy the right of membership in their respective Components regardless of whatever organization or reorganization the Government or one of its agencies undertakes.”

It is clear from this that the union was dealing with future situations of a type similar to the present one. In the present case we have a reorganization based on a policy to “privatize” in which Federal Government employees become employees of a private non-profit foundation and doing the same type of work, requiring the same academic knowledge and expertise within many of the same job classifications both before and after the reorganization. The National Board of Directors in exercising its discretion was doing so in a manner consistent with the policy of section 6(3) of its constitution. In our view, as far as this Board is concerned, the actions taken to extend membership eligibility to the employees concerned in this application must be viewed as valid and effective.

16. Having come to the above conclusion it is unnecessary for us to consider evidence put forward by the applicant to establish its “practice of admitting persons to membership without regard to the eligibility requirements of its charter, constitution or by-laws”.

17. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on April 10, 1979, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

18. The Board is further satisfied that the dispute relating to the composition of the bargaining unit cannot affect the trade union’s right to certification, and an interim certificate will issue in respect to the bargaining unit found appropriate by the Board. As a point of clarification such unit described in the interim certificate will be deemed not to include those classifications which are to be the subject of the Officer’s report.

1869-78-U United Rubber, Cork, Linoleum and Plastic Workers of America, (Complainant), v. Gesco Distributing Limited carrying on business as **General Foam and Cushion**, (Respondent).

Discharge for Union Activity – Section 79 – Failure to adduce evidence relating to management’s knowledge of grievor’s union activity prior to discharge – whether circumstances surrounding discharge sufficient to find anti-union animus

BEFORE: Robert D. Johnston, Vice-Chairman, and Board Members O. Hodges and F. W. Murray.

APPEARANCES: *H. P. Rolph and L. Collins for the complainant; J. Carrier, B. Neskar and B. Moncik for the respondent.*

DECISION OF ROBERT D. JOHNSTON, VICE-CHAIRMAN, AND BOARD MEMBER F. W. MURRAY; June 19, 1979

1. This is a complaint under section 79 of *The Labour Relations Act* in which the complainant alleges that the grievor, Trevor Aarons, has been dealt with by the respondent contrary to the provisions of sections 56, 58 and 61 of the Act.

2. The respondent called three witnesses to give evidence as to circumstances leading to the discharge of Aarons. These witnesses were John Zardo, the plant operations manager, Joseph Moynagh, warehouse supervisor, and Albert Anderson, lead hand packer. Anderson appeared before the Board under subpoena. According to the witnesses, Aarons was discharged because of irregular attendance and punctuality, but especially for inadequate work output.

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[A detailed review of the evidence has been omitted.]

29. Section 79(4a) of *The Labour Relations Act* places the burden of proof upon the employer to establish on the balance of probabilities that it did not act contrary to the Act. In cases of this kind, the Board has stated that the employer is not required to prove “just cause” to the degree that would be required under the grievance and arbitration provisions of a collective agreement.

30. The *Barrie Examiner* case, [1975] OLRB Rep. Oct. 745, states that “the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts. First, that the reasons given for the discharge are the only reasons, and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred.”

31. The Board has also found, in *The Corporation of the City of London* case, [1976] OLRB Rep. Jan. 990, that it is “incumbent upon the respondent to prove on the balance of probability that it either did not have knowledge of the trade union activity and therefore could not have been motivated by it, or that in spite of its knowledge it acted without anti-union motive”.

32. In this case, the testimony of the three witnesses for the employer is that Aarons was discharged for a record of poor work performance and unsatisfactory attendance and punctuality, which had been building up over several months. The employee had been warned by his supervisor, Binelli, in November, by Moynagh and Zardo on December 4th and 5th, and by Moynagh, in the company of Anderson, on January 12th. Finally, it is the position of the respondent that on January 31st Zardo made the decision to terminate Aarons and, for reasons which were given in evidence, carried out this decision on February 6th.

33. Both Zardo and Moynagh denied having any knowledge of union activity prior to February 19, 1979. This would be consistent with Aarons' evidence that in December he only talked to six or seven employees, and that in carrying out his union activities on February 2nd and 5th he took care to hide his activities from management and did not believe that any member of management saw him engaging in these activities.

34. Counsel for the complainant argued that the employer's case is a "cleverly constructed alibi", put together after it received the section 79 complaint, and in which Anderson, the lead hand, is a key player in what is alleged to be a conspiracy. According to this argument, the respondent's management had knowledge of union activity, and particularly of Aarons' activity, at least as early as mid-December. This knowledge would have had to have come from Anderson or, in part, from Ralph Powell.

35. The complainant's counsel filed supplementary particulars with the Board on April 5, 1979. Two of these particulars were especially important to the question of management's knowledge of union activity and Anderson's role in allegedly conveying this knowledge to management.

36. The first of these supplementary particulars stated that "on or about December 14, 1978, Anderson asked Aarons to go to the washroom for a smoke, and that at that time Anderson stated that Zardo knew of Aarons' attempts to interest other employees of the respondent in joining a trade union, and that he further stated that Zardo had gained this information through Ralph Powell". The complainant did not call or subpoena Powell and therefore there was no substantiation for this particular concerning a meeting which Anderson categorically denied ever took place. The second supplementary particular referred to the meeting of March 19th at the residence of Anderson. It alleged that on that occasion "Anderson stated that he had met with Neskar and had been told that if a trade union came to represent the employees of the respondent Neskar would close the plant down". Anderson, it is claimed, "further stated that Neskar had asked him what he knew about trade union organizational activities in respect to the respondent's work force". Len Collins, the union's organizer, was present at this meeting but his evidence failed to corroborate the statement attributed to Anderson. It is hard to understand why Collins would not have clarified or further investigated whatever he heard at this meeting, given that by March 19th this complaint had been filed for over a month, the Board's Labour Relations Officer had made his inquiries, and the union had received notice of the hearing date for this case.

37. The failure of the complainant to substantiate through evidence the statements made in the two aforementioned supplementary particulars is critical to this case. Clearly the Board, in reaching a decision, must make a decision as to whether or not it prefers the evidence of Anderson, the key witness for the respondent, or of Aarons, the grievor. On the

one hand, Anderson's evidence is supported by the testimony of two other witnesses for the respondent and, on the other hand, Aarons' evidence is largely without corroboration in respect of any facts which would support the conspiracy theory advanced in argument by counsel for the complainant. Anderson's evidence was straightforward and candid, in which he admitted both his personal opinions concerning the effect that a union might have on continuing employment and also admitted knowledge from mid-January of Aarons' union activities – hardly the evidence to be expected from someone allegedly party to a conspiracy against the grievor. Both Anderson's and Aarons' testimony stood up well under cross-examination but on balance, in view of the lack of evidence to support the conspiracy theory, the Board finds that it prefers the evidence of Anderson.

38. This being the case, we find that the management of the respondent acted without knowledge of union activity, and therefore cannot be said to have discharged Aarons as the result of anti-union animus. The Board accepts the employer's reasons for discharging the grievor following warnings concerning work performance, and accordingly this complaint is dismissed.

DECISION OF BOARD MEMBER OLIVER HODGES:

1. I dissent from the decision of the majority.

2. I am in accord with the majority's view of the effect of this Board's decisions in the *Barrie Examiner* case, [1975] OLRB Rep. Oct. 745, and the *Corporation of the City of London* case, [1976] OLRB Rep. Jan. 990. However, in assessing the evidence, it is my conclusion that the respondent employer has failed to discharge the onus of proof imposed by section 79(4a).

• • •

[A detailed review of the evidence has been omitted.]

9. I agree with the majority's view that both Aarons and Anderson were credible witnesses and that their testimony stood up well under cross-examination. The evidence adduced by the complainant that the respondent had knowledge of union activities in the plant, and that Aarons was discharged because of his role in the union activities, is largely circumstantial. This is not, however, fatal to the complainant's case. In the *Barrie Examiner* case, [1975] OLRB Rep. 745, the Board said:

“The location of the onus of proof is an important consideration in cases such as this one. The reason, or reasons, behind the discharge of an employee occurring in the context of union activity are best determined by an examination of the objective circumstances surrounding the discharge. In other words, the circumstantial evidence surrounding the discharge must be examined and inferences drawn from that evidence. There are two competing inferences that can be drawn. Either that the discharge was motivated by an anti-union animus or that the discharge was for some reason totally unrelated to the presence of union activity at or around the time of discharge. The Board must determine which of the two inferences is more probable. In many cases,

however, often because of the unsatisfactory nature of the evidence, it may be difficult to draw either inference with much certainty. In such cases, where the evidence is equally balanced, a decision can only be rendered by resorting to the onus of proof. Since neither party can establish a case on the balance of probabilities, the case can only be determined by deciding against the party upon whom the burden of proof rests."

10. It is my view that this is a case where the matter must be determined by resort to the onus of proof. In my opinion, the respondent company has failed to establish on the balance of probabilities 1) that it had no knowledge of union activities and was not motivated by an anti-union animus, and 2) that the reasons given for the complainant's discharge were the real reasons. Accordingly, I find that the respondent has breached section 58(a) of *The Labour Relations Act*.

11. I would have reinstated Mr. Aarons in his former employment with no loss of seniority and with payment for accumulated wages and benefits for all time lost.

0049-79-R The Association of Newspaper Agents, (Applicant), v. **The Globe and Mail** Division of F.P. Publications (Eastern) Limited, (Respondent).

Certification – Practice and Procedure – Trade Union Status – Board determining status of organization without prejudice to final determination relating to employee status – trade union status dependent upon determination of employee status

BEFORE: R. O. MacDowell, Vice-Chairman and Board Members C. G. Bourne and O. Hodges

APPEARANCES: *F. J. Matthews and Richard Metler for the applicant; Ross Dunsmore, Wallace Kenny, Ken Marskell and Ron Goebel for the respondent.*

DECISION OF THE BOARD; June 14, 1979

1. This is an application for certification. The principal issue in the case involves "the employee" status of the individuals who are members of the applicant organization and for whom that organization seeks bargaining rights. The applicant contends that all of these persons are "dependent contractors" and thus, "employees" within the meaning of *The Labour Relations Act*. The respondent, on the other hand, contends that they are independent contractors and are thus excluded from *The Labour Relations Act*. Although neither party took this position, it is also quite possible that some of the individuals are dependent contractors while others are independent contractors. It was apparent that the Board would have to resolve this issue and, in accordance with its usual practice, decided to appoint a Labour Relations Officer to enquire into the duties and responsibilities of the subject individuals.

2. The applicant organization has never previously appeared as a party in any proceeding before the Board and must, therefore, establish that it is a "trade union" within the meaning of section 1(1)(n) of The Labour Relations Act. However, a trade union is defined as an "organization of employees", so that the trade union status issue is intimately connected with the employee status issue. Moreover, the preliminary evidence heard by the Board indicates that some of the members of the applicant, including its principal officer, may be "employers" – thus raising the issue of employer involvement in the organization discussed by the Board in *Canada Crushed Stone*, [1977] OLRB Rep. Dec. 806.

3. In order to expedite matters, and in accordance with the agreement of the parties, the Board decided to hear the applicant's evidence on whether it was an organization formed for purposes that included collective bargaining. The Board decided to make a determination on this issue, without prejudice to the respondent's right to make full argument concerning the legal effect of a finding that some of the subject individuals are independent contractors and/or employers. The applicant had a witness present who was prepared to give evidence concerning the origins of the organization, and it was convenient to hear this evidence at the initial hearing.

4. There was filed with the Board the constitution setting out the objects of the organization including, *inter alia*, "the regulation of relations between newspaper agents and their employers or newspaper publishers with whom they have business relations and the negotiation of contracts with the said employers and/or newspaper publishers implementing progressively better working conditions." The constitution provides for responsible officers to manage its affairs. The Board also heard evidence concerning certain meetings which were held and at which the constitution was ratified, persons were enrolled into membership in the organization and the election of officers took place. All of these events occurred at the same meeting and there is no question that each act was intended to be related to each other act and that all were designed to make the applicant a trade union. (See: *U.A.W. Building Corporation* [1977] OLRB Rep. July 472.) Having regard to the statutory definition of a trade union and the evidence before us, we are satisfied that the applicant is an "organization ... formed for purposes that include the regulation of relations between employees and employers ...". As we have already noted, however, a final determination of the applicant's status must await the determination as to the status of the persons who constitute its members.

5. The Board hereby appoints Mr. J. Leonard, Labour Relations Officer, to enquire into the list and composition of the bargaining unit, including the employee status of the persons claimed by the respondent to be independent contractors and/or employees, and to enquire also into the community of interest of the persons said by the applicant to constitute a unit appropriate for collective bargaining.

0409-79-R Canadian Food & Alliance Workers Union 175 chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC, Applicant, v. **Gordons Markets** A Division of Zehrmart Limited, Respondent.

Appropriateness – Bargaining Unit – Practice and Procedure – Board describing retail food store units by stores within municipality

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members W. Gibson and W. R. Rutherford.

APPEARANCES: *Douglas Wray and Frank Kelly for the applicant; R. W. Kitchen and R. Goldsmith for the respondent.*

DECISION OF THE BOARD; June 22, 1979

1. The name “Gordon’s Markets, A Division of Zehrmart Ltd.” appearing in the style of cause of this application as the name of the respondent is amended to read: “Gordons Markets A Division of Zehrmart Limited”.

2. This is an application for certification.

3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.

4. The applicant is seeking certification for a unit of part-time employees and in its application described, in part, the unit as “all employees of the respondent *in its stores* in Wallaceburg, Ontario, ...” (emphasis added). At the hearing, the applicant asked to amend its description of the unit by deleting the phrase “in its stores” on the grounds that the respondent had only one store in the municipality on the date of the application and in such cases the Board’s practice is to describe the bargaining unit in terms of all employees of the respondent in the municipality. While the respondent had used in its reply filed with the Board the phrase “in its store”, it told the Board that it agreed to the applicant’s description containing the phrase “in its stores”. It is the Board’s practice in dealing with applications for certification for employees of retail food stores to include in the bargaining unit the employees in all of the stores of the respondent (owner) in the municipality in question. It seems appropriate to the Board, then, that the bargaining unit should be described in such instances in terms of “all employees of the respondent in its retail stores”. In that respect, and having regard for the fact that the parties were otherwise agreed on the description of the unit, the Board finds that all employees of the respondent in its retail stores in Wallaceburg, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during off-school hours and during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

5. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on June 8th, 1979, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of

The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

6. A certificate will issue to the applicant.
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0304-79-U 0305-79-U Ontario Public Service Employees' Union,
(Applicant), v. **Humber College of Applied Arts and Technology**,
(Respondent).

Discharge for Union Activity – Employee – Security Guard – Strike – Guards employees under The Colleges Collective Bargaining Act – Employer dismissing guards and sub-contracting work after guards engaged in legal strike – collective agreement expressly granting right to sub-contract – whether dismissals violations of Act.

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members W. F. Rutherford and E. C. Went.

APPEARANCES: *S. M. Grant and T. Conlan for the applicant/ complainant; Donald F. O. Hersey and Jim Davidson for the respondent.*

DECISION OF THE BOARD; June 28, 1979

1. This is a complaint filed under Section 78 of The Colleges Collective Bargaining Act alleging a violation of Section 76 of the Act and an application for consent to prosecute for the same alleged violation of the Act. These matters, which both arise from the decision of the college to contract out its security work, are hereby consolidated.

2. For the most part the facts are not in contention and may be summarized as follows. The employees of the college represented by the complainant union and falling within the support staff bargaining unit engaged in a lawful strike between January 23, 1979 and February 7, 1979. The security staff, as referred to in schedule "A" of the complaint, are members of the complainant union and have been treated by the employer as coming within the support staff bargaining unit and as being covered by the support staff collective agreement. The security staff along with the other support staff employees took part in the lawful strike which commenced on January 23, 1979. Indeed, section 60(3) of The Colleges Collective Bargaining Act stipulates that during the course of a lawful strike all employees in the bargaining unit shall be deemed to be taking part in the strike and no employee in the bargaining unit shall be paid salary or benefits during the period of the strike. The municipal police advised the college that it could not be responsible for security within the college during the strike. The college, which either employs or provides education services to approximately 8,000 persons and has \$32 million in assets and buildings, hired a private security force at the outset of the strike. The security force first hired was found to be unsatisfactory and a second private security force was engaged for the remainder of the strike. The evidence establishes that there were bomb threats made during the course of the strike and that a valve in the main heating system was tampered with so that an explosion would have

occurred had the tampering not been discovered. The strike ended on February 7, 1979 and the regular security force returned to work. The union brought before the Board a complaint alleging that the employer's decision to contract out its security work during the strike constituted a violation of section 60(3) of the Act. The earlier complaint was adjourned sine die.

3. Following the strike, Mr. J. L. Davidson, Vice-President Administration, reassessed the college's security arrangements and put forward the following recommendation to the College Finance Committee in a memo dated April 17, 1979. The memo reads:

“ – CONFIDENTIAL –

G. Wragg
Finance Committee

Agenda –

J. L. Davidson

1979 04 17

STAFFING FOR COLLEGE SECURITY

1979 04 17

From the early days of organization, the College has engaged and developed its own security force. With the introduction of the first collective agreement, the members of the Security Department were included under the recognition clause of the Support Staff Union.

This mode of operating posed no particular problems until the recent labour strike of all support staff personnel. Confronted with the prospect of being totally vulnerable to vandalism, we were advised by the Staff Relations Department of the Ministry and the Intelligence Department of the Metro Police that it was both a management right and a responsibility to take all steps necessary to secure the safety of people, college property and college buildings. Having taken these steps, our right to have done so is currently being challenged by O.P.S.E.U. before the Ontario Labour Relations Board. The similar actions of six other colleges are also being challenged.

Having now been brought into phase, the terms of the current collective agreements for both the support staff and faculty units expire on August 31, 1979. Whatever we may feel about the prospects of a joint strike, the possibility is certainly present.

As the procedures for doing so are fully detailed with the current support staff collective agreement, I am recommending that we elect now to replace our present Security Department with an externally contracted service.

Dimensions of Proposed Change:

1. Number of college personnel effected 8 Full-Time

2. College Security Dept. Budget 1979/80

– F.T. Salaries	\$ 98,216
– Overtime	5,000
– Fringe Benefits	10,053
– Special Supplies	500
Total	\$113,769

3. *Pinkerton Security Services Ltd.*

Total Annual Cost \$ 91,111 (79/80 rates)

Note: The costs and services of several external security firms have been assessed. Pinkerton Security is recommended as providing the best combination of service and cost.

4. Difference in annual terms between internal and external security service \$22,658 (saving to college).

5. All current college personnel would be given six weeks salary in lieu of notice as required by collective agreement.

– Period of Notice: May 15 to June 30, 1979

– Estimated cost of severance \$12,317*

*Exclusive of normal vacation entitlement.

6. The Pinkerton Service would commence with effect from May 15, 1979.

Principal Advantages of Contracted Security Service

1. Continuity of college security services in the event of a future labour strike.
2. Additional security personnel available on short notice for special college functions at straight time – no overtime rate.
3. No absentee problem – full complement guaranteed each day.
4. No discipline problems – guards replaced at request of client.
5. No administrative requirement – i.e., recruiting, schedules, vacations, sickness, equipment, payroll or attendance records.
6. According to the experience of other colleges – more professional and consistent security service.

7. Twenty per cent reduction in annual cost for equivalent service levels.

– CONFIDENTIAL DATA –

J. L. Davidson

Vice President Administration”

Mr. Davidson testified that consideration was given to the idea of seeking to include the security guards in a separate bargaining unit without the right to strike but the Chairman of the Council of Regents advised that in his view the idea was not a practical one. Mr. Davidson admitted that the decision to contract out the work “did not turn on economics but on vulnerability” and answered in the affirmative when asked if the primary concern of the college was that the persons employed by it as security guards belonged to a bargaining unit with the right to strike. Indeed, the primary motive is evident from a reading of the memo reproduced above.

4. The College Board of Governors resolved to rescind its policy of maintaining a security department staffed with college employees on April 30, 1979, effective from June 15, 1979 and to have the functions performed by an outside firm operating under contract to the college from June 15, 1979.

In accord with article 19.05 of the collective agreement the local union was served with notice to this effect by memo dated May 4, 1979. Nine employees of the college are directly affected by the decision. The employees affected have been treated in accord with the provisions of article 19.05 of the collective agreement. The article, which the Board reads as giving the college the express right to contract out, provides:

“19.05 (a) If the College decides to contract out work or services which are being performed by employees at the commencement date of this agreement, which will cause the layoff of employees covered by this Agreement, the College will notify the Union of the decision to contract out six (6) weeks prior to contracting out the work or services concerned.

(b) If requested by the Union within seven (7) days of the date of such notification, the College will give the Union an opportunity of a meeting with the College to discuss minimizing dislocation of employees caused by the contracting out. If such a meeting is requested by the Union, it shall be held within seven (7) days after the request.

(c) Employees being laid off because of the contracting out of work or services being performed at the commencement date of this Agreement shall be notified in writing at least six (6) weeks in advance of the date of the layoff.

(d) Prior to a non-probationary employee being laid off, such employee shall have the right to exercise his seniority in accordance with Article 11 of the Collective Agreement.

(e) An employee who has been laid off because of contracting out shall have the option of waiving the recall procedure provided he advises the employer in writing that he intends to exercise his option to waive the Recall Procedure at least two (2) weeks prior to the actual layoff, otherwise the Recall Procedure remains in effect. In the event that an employee laid off exercises his option to waive the Recall Procedure, as herein set out, he shall be entitled to severance pay based on one (1) weeks pay at his current salary for each year of service. In deciding the amount of severance pay required to be paid by the College, any pay in lieu of notice required to be paid under The Employment Standards Act or any gratuity payments paid on termination of employment based on unused attendance credits (sick leave credits) shall be deemed to be a credit toward the severance pay entitlement under this paragraph (e). The intention of this provision is to avoid pyramiding of pay in lieu of notice under The Employment Standards Act, unused attendance credits (sick leave credits) and the severance pay requirement hereunder.”

5. Counsel for the Union argues that the action of the college denies the right of its security force employees to coverage under the collective agreement and participation in the lawful activities of the trade union. The union argues that the result of the college's action makes it illegal. The union also argues, however, that notwithstanding the result, the Board must conclude in this case that the college acted from an anti-union motive. The union argues that the college did not act for reasons of business efficiency or economics but because it felt itself vulnerable from strike action. The union argued that the Act allows those covered by it to engage in strike activity and accordingly, the employer cannot permanently contract out a portion of its work simply because the employees who do the work have exercised, or may in future exercise, their right to engage in a lawful strike. The union referred the Board to *Academy of Medicine*, [1977] OLRB Rep. Dec. 783, *Humpty Dumpty Foods*, [1977] OLRB Rep. July 401; 78 CLLC ¶16,136 and *Culverhouse Foods Incorporated*, [1977] OLRB Rep. Jan. 16, in support of its position.

6. The college argues in the alternative. The college argues firstly, that the Board should exercise its discretion under section 1(l)(vi) of The Colleges Collective Bargaining Act and find that the security guards are employed in a managerial or confidential capacity in that they should not be included in the support staff bargaining unit by reason of their duties and responsibilities to the employer. Counsel for the college referred the Board to Section 11 of The Labour Relations Act which provides:

“The Board shall not include in a bargaining unit with other employees a person employed as a guard to protect the property of an employer, and no trade union shall be certified as bargaining agent for a bargaining unit of such guards and no employer or employers' organization shall be required to bargain with a trade union on behalf of any person who is a guard if, in either case, the trade union admits to membership or is chartered by, or is affiliated, directly or indirectly with an organization that admits to membership persons other than guards.”,

and to *Crain & Sons Ltd.*, 63 CLLC ¶16,291 in support of his contention that security guards perform duties and responsibilities which have resulted in their exclusion from bargaining units of other employees under The Labour Relations Act and which should cause this

Board, which administers The Labour Relations Act, to exclude them from the support staff bargaining unit as it is empowered to do under The Colleges Collective Bargaining Act. The college argues that if the Board finds the security guards to be employed in a managerial or confidential capacity, then the complaint must fail because section 76 of The Colleges Collective Bargaining Act, the section which the Union alleges has been violated, provides that:

“no person shall be deemed to have contravened this subsection by reason of any act or thing done or omitted in relation to a person employed in a managerial or confidential capacity.”

When asked by the Board, counsel for the college maintained that if the security guards were found to be employed in a managerial or confidential capacity under The Colleges Collective Bargaining Act they could bargain collectively under The Crown Employees Collective Bargaining Act or The Labour Relations Act.

7. The college argues in the alternative, that even if the Board finds the security guards to be employees within the meaning of The Colleges Collective Bargaining Act, it must dismiss the complaint on its merits. Counsel argues that the employer can legitimately act because of a fear of vulnerability during a legal strike and relies on the *Webster and Horsefall* case [1969] OLRB Rep. Sept. 780 and the *Academy of Medicine* case (supra). Counsel for the college maintains that a fear of vulnerability during a strike does not constitute an anti-union motive and therefore the college's decision to contract out its security is exempt under section 75 of The Colleges Collective Bargaining Act which is the equivalent of section 68 of The Labour Relations Act.

8. The Board has been asked to find that the security guards who are the subject of this application are excluded from the support staff bargaining unit by reason of being employed in a managerial or confidential capacity. The support staff bargaining unit is described in schedule 2 of The Colleges Collective Bargaining Act as follows:

“The support staff bargaining unit includes the employees of all boards of governors of colleges of applied arts and technology employed in positions or classifications in the office, clerical, technical, health care, maintenance building service; shipping, transportation, cafeteria and nursery staff but does not include,

- (i) foremen,
- (ii) supervisors,
- (iii) persons above the rank of supervisor,
- (iv) persons employed in a confidential capacity in matters related to employee relations or the formulation of a budget of a college of applied arts and technology including persons employed in clerical, stenographic or secretarial positions.
- (v) *other persons employed in a managerial or confidential capacity,*

- (vi) persons regularly employed for not more than twenty-four hours per week,
- (vii) students employed in a co-operative educational training program undertaken with a school, college or university,
- (viii) a graduate of a college of applied arts and technology during the period of twelve months immediately following completion of a course of study or instruction at the college by the graduate if the employment of the graduate is associated with a certification, registration or other licensing requirement,
- (ix) a person engaged for a project of a non-recurring kind,
- (x) a person who is a member of the architectural, dental, engineering, legal or medical profession, entitled to practise in Ontario and employed in a professional capacity, or
- (xi) a person engaged and employed outside Ontario.” [emphasis added]

The term “person employed in a managerial or confidential capacity” is defined in section 1(l) of the Act as:

“... a person who,

- (i) is involved in the formulation of organization objectives and policy in relation to the development and administration of programs of the employer or in the formulation of budgets of the employer,
- (ii) spends a significant portion of his time in the supervision of employees,
- (iii) is required by reason of his duties or responsibilities to deal formally on behalf of the employer with a grievance of an employee,
- (iv) is employed in a position confidential to any person described in subclause (i), (ii) or (iii),
- (v) is employed in a confidential capacity in matters relating to employee relations,
- (vi) *is not otherwise described in subclauses (i) to (v) but who, in the opinion of the Ontario Labour Relations Board should not be included in a bargaining unit by reason of his duties and responsibilities to the employer;*” [emphasis added]

The college asks the Board to exercise its discretion under subsection (vi) of section 1(l) and find the security guards to be employed in a managerial and confidential capacity and hence excluded from the scope of the support staff bargaining unit.

9. An “employee” for purposes of The Colleges Collective Bargaining Act is defined in section 1(f) of the Act as:

“... a person employed by a board of governors of a college of applied arts and technology in a position or classification that is within the academic staff bargaining unit or the support staff bargaining unit set out in Schedules 1 and 2;”

The effect of deciding that security guards are employed in a managerial or confidential capacity by reason of their duties and responsibilities to the employer would be to deprive the security guards of employee status and the right to bargain collectively under The Colleges Collective Bargaining Act. Counsel for the college maintained at the hearing that the security guards, if excluded, could bargain collectively under either The Crown Employees Collective Bargaining Act or The Labour Relations Act. The Board, however, has carefully reviewed the relevant statutes and has concluded that if the security guards were to be excluded from the Colleges Collective Bargaining Act they could not bargain collectively under either the Crown Employees Collective Bargaining Act or The Labour Relations Act. The result of their exclusion under The Colleges Collective Bargaining Act, therefore, would be far different from the application of Section 11 of The Labour Relations Act which segregates security guards but which affords to them employee status and the right to bargain collectively.

10. An employee for purposes of The Crown Employees Collective Bargaining Act is defined under section 1(g) of that Act as:

“... a Crown employee as defined in The Public Service Act but does not include,

- (i) a member of the Ontario Provincial Police Force,
- (ii) *an employee of a college of applied arts and technology,*
- (iii) a person employed in a managerial or confidential capacity,
- (iv) a person who is a member of the architectural, dental, engineering, legal or medical profession entitled to practise in Ontario and employed in a professional capacity,
- (v) a student employed during the student's regular vacation period or on a co-operative educational training program or a person not ordinarily required to work more than one-third of the normal period for persons performing similar work except where the person works on a regular and continuing basis,
- (vi) a person engaged under contract in a professional or other special capacity, or for a project of a non-recurring kind, or on a temporary work assignment arranged by the Civil Service Commission in accordance with its program for providing temporary help,
- (vii) a person engaged and employed outside Ontario,
- (viii) a person employed in the office of the Provincial Auditor, or

- (ix) a person employed by or under the Tribunal or the Grievance Settlement Board;" [emphasis added]

While it is clear from a reading of The Ministry of Colleges and Universities Act, S.O. 1971 c. 66 and The Crown Agency Act R.S.O. 1970 c. 100 that the employees of Humber College are "crown employees" within the meaning of section 1(e) of The Public Service Act –

"... a person employed in the service of the Crown or *any agency of the Crown* but does not include an employee of Ontario Hydro or the Ontario Northland Transportation Commission." [emphasis added],

they are expressly excluded from the operation of section 1(g)(ii) of The Crown Employees Collective Bargaining Act. Collective bargaining in the community colleges is regulated under The Colleges Collective Bargaining Act and it follows, therefore, that all persons employed by the colleges are excluded from the operation of The Crown Employees Collective Bargaining Act. The Labour Relations Act, on the other hand, does not expressly extend to the Crown and accordingly, the security guards who are Crown employees could not bargain collectively under that Act if excluded from The Colleges Collective Bargaining Act (see Section 11, The Interpretation Act, R.S.O. 1970 c. 225). If the security guards who are the subject matter of this application were to be excluded from The Colleges Collective Bargaining Act they would retain status as Crown employees under The Public Service Act R.S.O. 1970 c. 386, but would not have the right to bargain collectively under any of the statutes governing collective bargaining in this jurisdiction. In the result, the exclusion of the security guards from the operation of The Colleges Collective Bargaining Act for the reasons which underpin the segregation of security guards under section 11 of The Labour Relations Act would have a far more drastic impact than the application of section 11 of The Labour Relations Act.

11. If the legislature had wished to segregate security guards under The Colleges Collective Bargaining Act it would have been a simple matter to have included a parallel provision to section 11 of The Labour Relations Act. The legislature, however, chose not to incorporate such a provision into The Colleges Collective Bargaining Act. Similarly, if the legislation had wished to exclude security guards from the operation of the Act altogether, it could easily have made an express exclusion to that effect. Again, it did not. The legislature did, however, enact section 64(2) which provides.

"64(2) Where a lawful strike is declared or authorized or employees engage in a lawful strike, the employer may, with the approval of the Council, close a college or any part thereof where the employer is of the opinion that,

- (a) the safety of students enrolled in the college may be endangered;
- (b) *the college buildings or the equipment or supplies therein may not be adequately protected during the strike;* or
- (c) the strike will substantially interfere with the operation of the college,

and may keep the college or any part thereof closed until the employee organization that called or authorized the strike or that represents employees engaged in the strike gives written notice to the Council and the employer that the strike is ended.” [emphasis added]

The section supports the conclusion that the legislature intended to include security guards within the support staff bargaining unit and recognized that security problems might arise attendant with the stipulation under section 60(3) of the Act that upon notice to strike all support staff (including security guards) shall be deemed to be taking part in the strike from the date the strike is to commence.

12. The Board has never considered security guards to be persons employed in a managerial or confidential capacity and indeed, prior to the instant collective agreement, they were never considered by the employer as being employed in a managerial or confidential capacity. In so far as the college’s argument in support of their exclusion rests upon the treatment of security guards under The Labour Relations Act, it must fail. When the treatment afforded security guards under The Labour Relations Act is viewed in light of the consequences flowing from the absolute exclusion of security guards under The Colleges Collective Bargaining Act the Board must conclude that in the absence of a parallel section in The Colleges Collective Bargaining Act the legislature did not intend to segregate and secondly, that if it intended the results flowing from their exclusion from the Act it would have done so by clear and express language. In the absence of an express exclusion, therefore, and having regard to the import of section 64(2), the Board refuses to exercise its discretion and find the security guards to be employed in a managerial or confidential capacity within the meaning of The Colleges Collective Bargaining Act. Accordingly, the security guards are employees within the meaning of The Colleges Collective Bargaining Act with all of the rights accorded to employees thereunder.

13. Turning to the merits. We start with the proposition that an employer is free to run his business so long as he does not contravene his collective agreement or act for motives proscribed by the governing labour legislation. If not prohibited by the collective agreement, an employer can transfer operations, close down or contract out for genuine business reasons. He cannot, however, take these initiatives for purposes of defeating employee rights under the applicable statute. A review of the Board jurisprudence points out the distinction. In *Associated Medical Services* (supra) and *Culverhouse* (supra) the evidence established, notwithstanding purported business reasons, that the employers had taken initiatives of the type referred to above for the purpose of defeating employee and trade union rights and accordingly, the activity was found to be unlawful and a remedy shaped. In *Webster and Horsefall (Canada) Ltd.* (supra), however, a decision taken to close a plant because of the economic effect of a strike was found not to be in violation of The Labour Relations Act. The *Webster and Horsefall* decision stands for the sound proposition that while employees have the right to strike they do not have the right to force a settlement of their choosing and an employer’s decision to close in the face of an unaffordable demand is a legitimate business decision and not one proscribed by the Act.

14. Section 76(2)(a) of The Colleges Collective Bargaining Act provides:

“The Council, an employer or any person acting on behalf of an employer shall not,

- (a) refuse to employ or to continue to employ or discriminate against a person with regard to employment or any term or condition of employment because the person is exercising any right under this Act or is or is not a member of an employee organization;"

The Board found that the security guards who are the subject of this application are employees under The Colleges Collective Bargaining Act who have the right to strike and indeed, for all practical purposes, must strike with their fellow employees.

15. Mr. Davidson gave his evidence in a refreshingly forthright and honest manner. His evidence establishes clearly that the employer acted to ensure "continuity of college security services in the event of a future labour strike" because it saw itself as vulnerable in the circumstances of a strike. While other justifications were put forward, the decision was taken in order to guarantee continuity of security during the period of a strike. This is not a case where the employer is dissatisfied with the work of those presently doing the job (except for the problem arising as a result of possible strike action) nor is it a case where the employer is acting to realize an economic gain. Rather, this is a case where the employer seeks to insulate itself from the natural and inevitable consequences of the exercise by the security guards of their right to strike under The Colleges Collective Bargaining Act; consequences which are expressly dealt with in section 64(2) of the Act. Indeed, the college considered the alternative of a separate bargaining unit with no right to strike. Reduced to its simplest terms the employer acted because he saw himself as vulnerable due to the necessary discontinuance of his in-house security during the period of a strike. The comments of Mr. Davidson in his memo of April 17th, wherein he reminded the Finance Committee that the collective agreements were due to expire on August 31, 1979, and his oral evidence drive the Board to this conclusion. He stated in the memo:

"... Whatever we may feel about the prospects of a joint strike, the possibility is clearly present.

As the procedures for doing so are fully detailed within the current support staff collective agreement I am recommending that we elect now to replace our present Security Department with an externally contracted service."

16. While the Board can sympathize with the concern of the college for the security of its facilities and the safety of students during a strike, it must nevertheless find on the evidence before it that the college has acted to contract out its security services because of its fear that the persons employed by it as security guards, who struck in January of this year, may again exercise their right to strike following the expiry of the current collective agreement on August 31, 1979. In contrast to the treatment of security guards under The Labour Relations Act, the security guards employed by the college have the right to strike in concert with all of the other support staff employees under The Colleges Collective Bargaining Act and the college cannot act in the manner it has because those employed as security guards have in the past or may in the future exercise their right to strike. Accordingly, the Board hereby finds that the college violated The Colleges Collective Bargaining Act when it contracted out its security for the reasons established in evidence.

17. Having found the college to be in violation of the Act the Board reiterates that the employer has the authority to contract out for reasons which are not motivated by fear

that an employee will exercise a right under the Act or is in fact exercising a right under the Act. Furthermore, the Board's decision is not to be read as inhibiting the right of the employer to secure his premises and the safety of those who frequent his premises during a strike. The Board sees nothing in the Act as would prevent the college from making the necessary arrangements during the pre-strike notice periods provided under the Act to secure its premises in the event of a strike, including arrangements to contract the security services of non-employees during the period of a strike.

18. Having regard to all of the foregoing, the Board hereby directs the employer to return the persons affected by its decision to contract out its security service to their former positions and to compensate them for any lost wages or other benefits under the collective agreement. The Board will remain seized in the event the parties cannot agree on the amount of compensation, if any, owed to the individual employees affected.

19. Having dealt with the matter under the remedial powers granted it under section 78(4) of The Colleges Collective Bargaining Act, the Board hereby refuses to grant leave to prosecute.

1946-78-R International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, Applicant, v. **Kustom Insulation Ltd.**, H. Schumann Insulation Co., and H. S. Insulation Inc., Respondents.

Construction Industry – Related Employer – Two companies separately owned by husband and wife – Business under common direction or control – Potential erosion of bargaining rights considered.

BEFORE: Pamela C. Picher, Vice-Chairman and Board Members J. D. Bell and C. Ballentine.

APPEARANCES: *B. Fishbein and J. Duffy for the applicant and R. W. Kitchen, H. Schumann and L. Schumann for the respondents.*

DECISION OF THE BOARD; June 11, 1979

1. The applicant has applied under section 1(4) of The Labour Relations Act for a declaration that the respondents, Kustom Insulation Ltd. (hereinafter referred to as Kustom) and H. S. Insulation Inc. constitute one employer for the purposes of the Act. Section 1(4) reads as follows:

“(4) Where in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals,

firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

The respondents do not dispute that Kustom and H. S. Insulation are associated or related businesses but contend that the two businesses are not carried on under common control or direction and thus do not meet the criteria necessary for the Board to grant a declaration under section 1(4) of the Act.

2. Prior to November 1, 1977, the date upon which both Kustom and H. S. Insulation were incorporated, Henry Schumann operated a business under the name of H. Schumann Insulation Co. Mr. Schumann performed mechanical insulation work which he defined as the wrapping and installing of pipes and ducts in residential, industrial or commercial buildings. He managed all aspects of the business with the exception of keeping the books which were maintained by his wife, Lydia Schumann. During that period H. Schumann Insulation was bound by a collective agreement with the applicant union dated July 7, 1975.

3. On November 1, 1977, Kustom and H. S. Insulation were incorporated. Through a transaction dated the same day, H. Schumann Insulation was sold to Kustom. The parties agree that the transaction constituted a sale of a business within the meaning of section 55 of The Labour Relations Act and that Kustom therefore became bound by the collective agreement that had been in operation between the applicant union and H. Schumann Insulation.

4. Mr. Gary F. Parker, a chartered accountant with G. H. Ward and Partner testified that he gave advice to the Schumanns in their decision to incorporate. He testified that one reason they decided to incorporate two companies was to obtain certain tax advantages. The second reason was to create a non-union company so that they could expand the business into the house insulation market which is highly competitive and dominated by non-union contractors.

5. The legal control of Kustom and H. S. Insulation is separate. Lydia Schumann is the president, vice-president, secretary-treasurer, sole owner and shareholder of Kustom. Mr. Schumann is the president, vice-president, secretary-treasurer, sole owner and shareholder of H. S. Insulation. Mrs. Schumann, though, has been given the power to sign cheques on behalf of H. S. Insulation.

6. There is some overlap in the work performed by the two companies. Kustom performs mechanical insulation as defined above but does not perform any house insulation which Mr. Schumann described as the insulation of walls or attics for residential, industrial or commercial buildings. H. S. Insulation does both mechanical and house insulation. Kustom has never performed work for a non-union contractor. Mrs. Schumann testified that, in the main, she quotes only to union contractors because she cannot submit a competitive bid to a non-union contractor because of the wages she must pay under the terms of the collective agreement. She stated that if she could be competitive she would bid to non-union contractors. H. S. Insulation on the other hand bids solely to non-union contractors.

7. Compared to Kustom, H. S. Insulation is a small business. The volume and size

of its jobs are considerably less than those of Kustom. H. S. Insulation's sales in 1978 were approximately \$17,000. For almost a year after incorporation, H. S. Insulation hired no employees. In October of 1978 one full-time employee was hired. Since Kustom was incorporated in November 1977, the business has consistently grown. In 1977 its predecessor company, H. Schumann Insulation, had sales amounting to approximately \$93,000. In 1978 Kustom's sales were approximately \$133,000. In the first four months of 1979, Kustom's business had reached \$63,000 or almost half of the 1978 sales. In conjunction with its increasing business, Kustom has increased the number of employees in the bargaining unit. During peak periods, the predecessor company would hire approximately three employees. During equivalent periods Kustom employs ten to thirteen employees. In performing their respective jobs, there has never been an interchange of employees between Kustom and H. S. Insulation.

8. Kustom and H. S. Insulation operate out of the home of Mr. and Mrs. Schumann. On one side of the basement Mrs. Schumann has a desk, phone, adding machine, books, and filing cabinets for Kustom while Mr. Schumann has a similar arrangement for H. S. Insulation on the other side of the room. Each business has its own telephone number and a different mailing address. Each has its own business cards, stationery, account forms and cheques. Each maintains a separate bank account.

9. At times the assets of one company are used by the other. For example, Kustom has an unmarked truck which periodically is used by H. S. Insulation. Similarly H. S. Insulation has a large pin gun which is sometimes used by Kustom. The evidence indicates that when these assets are interchanged charges are levied for their use. Certain smaller items are also shared such as a ladder and the typewriter. Whether charges are made in respect of these items is unclear. Normally H. S. Insulation purchases materials for its jobs directly from Kustom which then buys back any leftover.

10. Mr. and Mrs. Schumann each perform work for both of the companies with the great majority of their time being spent working for Kustom. Mr. Schumann spends about 85 per cent of his time supervising Kustom employees on the construction sites. Mr. Schumann also assists in the preparation of the bids. He reads the blueprints, does the takeoffs and estimates the labour hours required for a particular job. Since Mr. Schumann showed Mrs. Schumann how to calculate the labor hours, however, she has done more of it herself in preparing the bids. Mrs. Schumann alone computes the pricing of the insulation, the amounts of materials required, sets the profit margin and determines the ultimate bid figure. The evidence establishes that she decides what jobs Kustom will bid on and signs the contracts. Mrs. Schumann does not go on the construction sites. She is, however, the one who normally, though not always, phones the union steward for additional employees. On a couple of occasions Kustom employees have been fired. Although the ultimate responsibility for making such decisions lies with Mrs. Schumann, the evidence indicates that in reaching her decision she normally consults with the shop steward and her husband. On behalf of H. S. Insulation, Mrs. Schumann does all of the typing and necessary book work. As well, during Mr. Schumann's frequent absences from the office, Mrs. Schumann answers the phone for H. S. Insulation.

11. The evidence demonstrates that many aspects of the two companies have been carefully separated. The legal control of Kustom lies completely with Mrs. Schumann while the legal control of H. S. Insulation is with Mr. Schumann. The line distinguishing the effec-

tive control and direction of the two companies, however, is far from decisive. Mr. Schumann fully managed H. Schumann Insulation, the predecessor company to Kustom, and Mrs. Schumann's work involved doing the books, a division of labour similar to that which now prevails in H. S. Insulation. With the creation of Kustom, Mrs. Schumann's role was unquestionably expanded. She took over the responsibility for determining which jobs to bid on, for performing most of the necessary calculations in compiling a bid, for signing contracts and for hiring and firing employees.

12. There are certain key areas, however, where Kustom is completely dependant on Mr. Schumann. He reads the blueprints and does the takeoffs which is a fundamental starting point in preparing a bid. Furthermore, Mr. Schumann alone has the practical knowledge and expertise required to supervise the work performed on the construction sites. Although Mrs. Schumann may technically carry the responsibility for firing employees, she must rely on her husband's assessment of an individual's capabilities. Furthermore, the Board concludes from the evidence that a large portion of Kustom's goodwill emanates from the reputation and expertise of Mr. Schumann. In view of all the evidence, Mr. Schumann cannot be accurately characterized as a mere employee. We further note in this regard that the agreement for purchase and sale between H. Schumann Insulation as vendor and Kustom as purchaser provided for a fair market value purchase price. The evidence establishes, however, that despite the terms of the contract no money exchanged hands. In the face of the totality of the evidence we can only conclude that the transfer of money was not necessary because Mr. Schumann was not giving up *de facto* control of the business, but rather entering a relationship whereby the control would be shared with his wife. The further indication on the joint nature of the two businesses is the absence of any evidence to suggest that Mrs. Schumann is paid a salary for the very important bookkeeping and telephone answering functions she performs for H. S. Insulation. Together Mr. and Mrs. Schumann run two businesses, one unionized and the other non-unionized to enable them to more fully participate in the insulation market.

13. The Board is fully satisfied that Kustom and H. S. Insulation are joint businesses under common control or direction within the meaning of section 1(4) of the Act. The remedy available under section 1(4) of the Act, however, is a discretionary one. Counsel for the respondent argued that even if the Board was satisfied that Kustom and H. S. Insulation were under some common control or direction it should decline to exercise its discretion and grant a declaration because the applicant union delayed in bringing the application to the Board and because the situation does not raise the mischief which section 1(4) was designed to remedy.

14. Concerning its allegation of unreasonable delay, counsel for the respondents contends that the union delayed almost a year after learning about the existence of H. S. Insulation before bringing an application to the Board. There is a conflict in testimony regarding when the union first became aware of H. S. Insulation. Both parties agree that it was marked by a telephone call from Mr. Joseph Duffy, the business manager for the union, to the Schumanns during which he accused Mr. Schumann of operating two companies and threatened to take legal action if something wasn't done. Mrs. Schumann testified that the call took place in March 1978 while Mr. Duffy insisted that the call was made in August. Following the call, the business agent who first informed Mr. Duffy of the rumor that Henry Schumann was doing work through H. S. Insulation reported that he had been in the Kitchener area to investigate the situation and hadn't been able to find any jobs being performed

by H. S. Insulation. Mr. Duffy further testified that sometime in October Mr. Stan Roos, the union steward, notified the union that other companies in the area were complaining that H. S. Insulation was taking jobs away from them. Mr. Duffy then went to his lawyer who told him what facts to gather in preparation for an application under section 1(4) of the Act.

15. In deciding whether a union's delay in bringing a section 1(4) application should persuade the Board to decline to grant a declaration, the Board seeks to balance the union's interest in preventing an erosion of its bargaining rights with the rights of the employees in the second company to decide if they wish to be represented by a union and, if so, by which one. Where a union acts promptly the rights of the trade union are normally given priority in that the Board views the employees in the second company in a manner similar to employees hired in a post certification buildup of an employer's work force. When a union stands by without protecting its bargaining rights, however, the interests of the employees must be given full consideration. (See *Evans-Kennedy Construction Limited*, decision dated May 16, 1979, File Nos. 1415-78-R through 1419-78-R, as yet unreported.)

16. In the instant case there is one employee who might fall into the bargaining unit if a section 1(4) declaration were issued. That employee was only hired in October 1978 or four months prior to the Union's application. This situation differs therefore from the situation in *Farquhar Const. Ltd.* [1978] OLRB Rep. Oct. 914, and *Ellwall and Sons Construction Limited*, [1978] OLRB Rep. June 535, for example, where the work forces in question had been left unrepresented for a number of years before the section 1(4) applications were brought. In those circumstances the unions' applications had more of the appearance of an attempt to expand bargaining rights without going through the normal certification process than an attempt to protect bargaining rights.

17. Whether the phone conversation between Mr. Duffy and Mrs. Schumann took place in March, 1978 or August, 1978, the Board is satisfied that the union neither sat on its rights nor condoned the existence of H. S. Insulation. Unlike many other cases where the Board has declined to exercise its discretion to grant a section 1(4) declaration because of delay (see *Farquhar Construction Limited*, *supra*; *Harold R. Stark Limited*, [1978] OLRB Rep. Oct. 945; *D. L. Stephens Contracting Niagara Limited*, [1978] OLRB Rep. June 531; *Zaph Construction Ltd.*, [1977] OLRB Rep. Nov. 741, and *Inducon Construction of Canada Limited*, [1975] OLRB Rep. April 399), H. S. Insulation was not performing particularly visible jobs which might persuade the Board that the union either knew or ought to have known about H. S. Insulation at a substantially earlier date. The union immediately responded to rumors about H. S. Insulation and with reasonable diligence worked to investigate the situation. The fact that Mr. Duffy threatened legal action in the first phone call makes it clear that the union did not condone the manner in which Kustom and H. S. Insulation were carrying on business. On the basis of all the evidence, the Board is satisfied that the union moved with dispatch to object to the use of H. S. Insulation as a non-union arm of Kustom and thus did not leave its bargaining rights unprotected. Accordingly, the Board is not prepared to find that a section 1(4) declaration should be withheld for reasons of delay.

18. One of the purposes of section 1(4) is to prevent an employer in respect of whom a union has obtained bargaining rights from diluting those rights by performing part of its business in an associated non-union company. Counsel for the respondents argued that in this case H. S. Insulation has not undermined the union's bargaining rights and that, ac-

cordingly, a declaration under section 1(4) would be inappropriate. Counsel emphasized that Kustom does not compete with H. S. Insulation both because the jobs performed by Kustom are larger than those performed by H. S. Insulation and because Kustom bids on union contracts while H. S. Insulation bids on non-union contracts. Counsel argued that given the present realities of the union/non-union markets, Kustom couldn't perform the work presently performed by H. S. Insulation because, given the higher wages that must be paid under the collective agreement, it couldn't submit a competitive bid on a non-union contract. To underline its position that H. S. Insulation is not operating to the detriment of Kustom, counsel highlighted the fact that Kustom's business is thriving.

19. In some cases the undermining of a union's bargaining rights is marked by the direct diversion of work that would have been performed by the union company to an associated non-union company. (See for example *Evans-Kennedy Construction Limited, supra*). In numerous instances the problem is accompanied by a transfer of employees from the union company to perform work for the non-union company. (See *Evans-Kennedy, supra*, and *Inducon Construction, supra*.) In some cases, as well, the erosion is marked by a reduction of business for the union company. (See for example *Farquhar, supra*, and *Ellwall, supra*.)

20. It is not necessary, however, for the union company to fall apart before concluding that an employer's scheme of operating a business through a union and non-union company has undermined a union's bargaining rights. In general, bargaining rights obtained by a union attach to the employer's business and not to a particular segment of its work. If an employer expands its business the union's bargaining rights automatically encompass the employees doing new work coming within the scope of the collective agreement. In this case the applicant obtained bargaining rights which covered the employees of H. Schumann Insulation within the bargaining unit performing all kinds of insulation work (except such work performed by members of the Master Insulators' Association in their plants). Their rights, therefore, encompassed the insulation work performed by H. Schumann Insulation at the time and would automatically have extended to any new type of insulation work taken on by H. Schumann Insulation. This situation did not change when H. Schumann Insulation was sold to Kustom.

21. Despite the present well-being of Kustom's business, the Board is of the view that H. S. Insulation is eroding the bargaining rights of the union because it effectively carves out from Kustom's business the work that Kustom might otherwise at least try to get and the work in respect of which the union would otherwise represent the employees. The existence of H. S. Insulation effectively nullifies the need for Kustom to try to compete with non-union contractors as other unionized employers are required to do. The double-breasted arrangement allows the respondent to avoid the applicant when doing house insulation and some kinds of mechanical insulation which is work which Kustom is fully equipped and able to perform.

22. In summary, the Board is satisfied that Kustom and H. S. Insulation are associated or related businesses under common control or direction. The Board is further satisfied that the union acted with sufficient dispatch in bringing the application to the Board. Because the double-breasted arrangement established by Kustom and H. S. Insulation effectively undermines the union's bargaining rights, the Board has further concluded that this is a proper case for the Board to exercise its discretion and grant a declaration. Accordingly, the Board declares that Kustom Insulation Ltd. and H. S. Insulation Inc. are one employer

for the purposes of the Act. Such declaration shall be effective in respect of all future contracts acquired by H. S. Insulation.

0175-79-R Garry William Gilbert, (Applicant), v. Christian Labour Association of Canada, (Respondent), v. **Lakeview Sheet Metal (Orillia) Limited** (Intervener).

Construction Industry – Termination – Whether employees not at work on day of application for termination may file application.

BEFORE: Rory F. Egan, Alternate Chairman, and Board Members E. C. Went and D. B. Archer.

APPEARANCES: *Garry William Gilbert and Larry Metcalfe for the applicant; Edward Vanderkloet and John Adema for the respondent; James R. Braden, Robert G. Facey and Douglas McFadden for the intervener.*

DECISION OF THE BOARD; June 12, 1979

1. This is an application under section 49 of The Labour Relations Act for a declaration that the respondent no longer represents employees of Lakeview Sheet Metal (Orillia) Limited in the bargaining unit for which it is the bargaining agent.
2. The respondent takes the position that the employees who signed and brought the application were not in the employ of Lakeview Sheet Metal (Orillia) Limited, (hereinafter called "the employer"), and had not been employed since April 18, 1979.
3. The respondent argued that in order to bring an application under section 49 the applicants must be employees on the date the application is brought. That is to say, the persons concerned must be at work since that is the customary requirement of the Board in certification applications in the construction industry sector.
4. Insofar as the argument of the respondent is concerned, we would say that it is a fact that in certification applications the Board has looked at the number of employees on the job on the date of the application for the purpose of the count, that is, the determination of the percentage of membership among employees. It is, however, only for the purpose of the count that this is done and it is done to ensure that the matter may be dealt with expeditiously and while the job in question is still in operation. It does not restrict the definition of "employee" or of "the bargaining unit".
5. The same considerations of speed and expediency do not apply in the case of applications for termination. In the present instance, it is abundantly clear that the applicants are long-term employees of the employer by whom they were trained and qualified as journeymen in their trade. They have a well-established history of employment by the employer subject only to periodic layoffs from which they are recalled. They are presently waiting and

are available for recall and the employer has stated that it intends to follow the usual practice of recalling them when work opens up.

6. Having regard to the submissions of the parties, the Board is satisfied on the basis of all the evidence before it that not less than forty-five per cent of the employees of Lakeview Sheet Metal (Orillia) Limited in the bargaining unit at the time the application was made had voluntarily signified in writing that they no longer wish to be represented by the respondent union on May 11, 1979, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent union under section 49(3) of the said Act.

7. The Board directs that a representation vote be taken of the employees of Lakeview Sheet Metal (Orillia) Limited. Those eligible to vote are all sheet metal workers and sheet metal apprentices in the employ of Lakeview Sheet Metal (Orillia) Limited in the County of Simcoe, The District Municipality of Muskoka and the Township of Thorah and all lands north thereof in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

8. Voters will be asked to indicate whether or not they wish to be represented by the respondent in their employment relations with Lakeview Sheet Metal (Orillia) Limited.

10. The matter is referred to the Registrar.

0087-79-M Marie Donalda Daub, Applicant, v. Ontario Nurses Association, Respondent Trade Union, v. **La Verendrye General Hospital (Fort Frances) Inc.**, Respondent Employer.

Religious Objectors – Sincerely held belief not religious – no exemption

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members D. B. Archer and C. G. Bourne.

APPEARANCES: *Marie Donalda Daub and Patrick Daub for the applicant; Kathleen O'Neil, Carol Bourre and Elaine Spicer for the respondent trade union and no one appearing for the respondent employer.*

DECISION OF THE BOARD; June 21, 1979

1. This application is made under section 39(1)(b) of The Labour Relations Act and the applicant is seeking exemption from an obligation to pay union dues to the respondent trade union (referred to herein as "the Association") because of her religious conviction or belief.

2. The Association agrees that the application is in respect of a first collective agreement and is timely. Employees coming within the bargaining unit described in the agreement, are not required to be members of the Association, but clause 7.01 of the agreement does require the respondent employer to deduct regular monthly dues from the pay of each employee in the bargaining unit and remit these amounts to the Association. It is exemption from this provisions that the Applicant is seeking. Dues were being deducted from the applicant's regular pay at the time the application was filed.

3. The applicant's religious beliefs are those of the Roman Catholic Church and she holds no other religious beliefs. She acknowledges that there is nothing in the teachings of her church which does not permit her to support the activities of trade unions. Her objection to paying dues is founded in her own personal convictions and beliefs. She strongly believes that certain professions such as policemen, firemen, doctors, nurses, ambulance attendants and teachers are morally obligated not to withhold their service from the public, whether or not it is lawful for them to do so. If members of the Association withheld their services from the respondent employer, the applicant's convictions would require her to continue working. In such circumstances, she believes that, by being required to pay dues, she would be indirectly supporting the unlawful acts of striking members, acts which she believes to be morally wrong. The applicant objects also to the use by trade unions of coercive tactics, particularly strikes, which she has observed. Therefore, she would object to paying dues to a trade union which might use those dues to provide financial assistance to another trade union which is engaged in a strike whether lawful or not. The latter concern notwithstanding, it is patently clear that the principal focus of the applicant's concern is with unlawful strikes. She volunteered the hypothesis that, if she was assured that there was no way for unlawful strikes to occur, she would have no objection to paying dues to a trade union.

4. The Association is subject to the provisions of The Hospital Labour Disputes Arbitration Act. Section 8(1) of that Act prohibits it from engaging in strikes. Unlike unions which are subject only to The Labour Relations Act and may lawfully strike if the Act's requirements are met, any strike by the Association or its constituent locals would be unlawful and none have occurred. Furthermore, the Association has a written policy which prohibits its locals from giving financial support to unions outside of the health disciplines field. A currently effective convention resolution exerts a similar prohibition in respect of supporting any other unions in the health disciplines field.

5. The applicant, in order to qualify for the exemption sought under section 39 of The Labour Relations Act, must convince the Board that her objection to the payment of dues to the Association is based on her religious beliefs. The Board considers the appropriate questions for it to ask itself about the applicant's beliefs and convictions to be the following (see *Mrs. Helena Wybenga*, [1976] OLRB Rep. Aug. 422):

- (a) are they sincerely held;
- (b) are they religious; and
- (c) are they the cause of the objection to paying union dues?

All three questions must be answered in the affirmative if the application is to succeed.

6. The strength of the applicant's convictions that nurses, as well as some other professions, have an obligation not to strike, leaves no doubt for the Board that it is a sincerely held conviction. The Association also acknowledges that the applicant's convictions are sincerely held. Whether these convictions are religious ones is not as readily ascertainable from the evidence. The applicant has an overriding concern that members of the Association might sometime engage in an unlawful strike, whether or not instigated or supported by the Association. This concern is rooted in her basic conviction that nurses have an obligation not to withhold their services from the public. She expresses this concern notwithstanding the fact that the Association has not been a party to any strike in Ontario and has current policies of not supporting strike activities of other trade unions either inside or outside the health disciplines field. The applicant's conviction that nurses are obligated not to withhold their services from the public was obviously shared by the Ontario Legislature when it instituted section 8 of The Hospital Labour Disputes Arbitration Act. It is not unreasonable to assume that that legislative action reflected the conviction of a significant portion of the populace of Ontario. But does this make it a religious conviction? The Board thinks not. The *Wybenga* case, *supra*, contains the following reference to an observation of the Ontario Supreme Court about the meaning of religious in a similar religious exemption provision in The Crown Employees Bargaining Act, 1972 (see *The Civil Service Association of Ontario (Inc.) v. Anderson* (1976), 9 O.R. (2d) 341 at p. 344):

"It is not necessarily ... related to a belief in the supernatural. One of the definitions of 'religion' in Webster's Dictionary is 'relating or devoted to the divine or that which is held to be of ultimate importance'."

The Board finds nothing in the facts of this case which serves to link the applicant's convictions to anything related or devoted to the divine or as being of ultimate importance, in spite of the appearance that her concern that members of the Association might engage in an unlawful strike seems to be firmly linked with a public, social concern already recognized by the legislature. Thus the Board is unable to characterize the applicant's convictions as religious ones and finds them not to be religious.

7. In the result, the Board is not satisfied that it is because of the applicant's religious beliefs that she objects to the payment of dues to the Association. The application is dismissed.

0411-79-R John Miller & Sons Ltd., (Applicant), v. United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Respondent).

Abandonment – Reconsideration – Termination – Timeliness – Application under section 51 untimely after appointment of conciliation officer – union asserting bargaining rights upon employer returning to Ontario – no abandonment – no grounds for revoking certificate.

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members B. Lee and E. C. Went.

APPEARANCES: *William Challis and E. Miller for the applicant; H. P. Rolph and David Strange for the respondent.*

DECISION OF THE BOARD; June 28, 1979

1. This is an application made by the employer under section 51 of the Act for a declaration by the Board that the trade union no longer represents the employees in the bargaining unit. Alternatively, the applicant employer asks the Board to exercise its powers of reconsideration under section 95(1) of the Act to revoke the certificate issued to the trade union in 1973.

2. Section 51 of the Act provides:

“(1) If a trade union fails to give the employer notice under section 13 within sixty days following certification or if it fails to give notice under section 45 and no such notice is given by the employer, the Board may, upon the application of the employer or of any of the employees in the bargaining unit, and with or without a representation vote, declare that the trade union no longer represents the employees in the bargaining unit.

(2) Where a trade union that has given notice under section 13 or section 45 or that has received notice under section 45 fails to commence to bargain within sixty days from the giving of the notice or, *after having commenced to bargain but before the Minister has appointed a conciliation officer* or mediator, allows a period of sixty days to elapse during which it has not sought to bargain, the Board may, upon the application of the employer or of any of the employees in the bargaining unit and with or without a representation vote, declare that the trade union no longer represents the employees in the bargaining unit.” [emphasis added]

3. In this case the union was certified on May 18, 1973 and served notice to bargain on May 17, 1973. Bargaining took place after the appointment of a Conciliation Officer on July 18, 1973. A “no board report” was issued to the parties on August 8, 1973 and from that date until the company completed the project on which it was working in Mawaki, District of Kenora, there was no further contact between the parties. With the exception of a 2 week period in March of 1974 the company did not operate in the Province of Ontario from November, 1973 until June 1979. The trade union provided the employer with a copy of the Ontario Provincial Collective Agreement covering carpenters under cover of letter dated May 14, 1979. The company, which commenced to operate once more in the Province of Ontario on or about June 1, 1979, takes the position that the union abandoned its bargaining rights when it failed to negotiate with the company or otherwise represent its employees in the 3-month period following release of the “no board report” on August 8, 1973. The employer asks the Board to make a declaration under section 51 of the Act or alternatively, to reconsider and revoke the certificate issued to the union in May, 1973.

4. An application under section 51(2) of the Act may only be filed “after having commenced to bargain but before the Minister has appointed a conciliation officer or mediator ...” In this case the last round of negotiations between the parties took place in 1973. A conciliation officer was appointed under the Act during the course of those negotiations and accordingly, the Board must find that the application under section 51(2) of the Act is un-

timely and the Board is without jurisdiction to make the declaration requested by the applicant company.

5. Turning to the company's request for reconsideration of the Board's decision to certify in the first instance. The union was not in a position to actively pursue its bargaining rights during the period November, 1973 to June, 1979 during which period the employer did not operate within this jurisdiction. Having regard to the letter of May 14, 1979 from the union to the company which the Board views as an assertion of bargaining rights at the first opportunity upon the employer's return to Ontario, the Board is not prepared to revoke or otherwise amend its decision to certify the respondent trade union on the basis of a 3-month period in 1973 following release of a no-board report during which time the union failed to actively pursue its bargaining rights.

6. Accordingly, the application under section 51(2) is hereby dismissed. The Board refuses to revoke its decision to certify the respondent trade union and hereby declares that the respondent trade union holds the bargaining rights for those employees of the applicant who are encompassed by the Board's certificate of May 18, 1973.

0397-79-R National Steel Car Guards Union, (Applicant), v. National Steel Car Corporation Limited (Respondent), v. Group of Employees, (Objectors).

Trade Union Status – Constitution not adopted or ratified – officers elected prior to drafting constitution.

BEFORE: Rory F. Egan, Alternate Chairman, and Board Members W. G. Donnelly and H. Simon.

APPEARANCES: *Eric H. Palmer and K. Brearley for the applicant; D. L. Brisbin and R. G. Allaster for the respondent; no one for the objectors.*

DECISION OF THE BOARD; June 21, 1979

1. This is an application for certification in which the applicant is required to prove its status as a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.

2. Evidence in support of the application was given by K. Brearley, a security officer engaged in protecting the plant of the respondent. His evidence established that the persons concerned are employed as guards to protect the property of the employer.

3. Mr. Brearley described the procedures which were followed in the attempt of himself and his fellow guard employees to form a trade union.

4. Before going any further into the evidence, we believe it would be helpful to set out the procedures which the Board has consistently required to be followed in order to

establish that an organization is a trade union within the meaning of section 1(1)(n) of the Act. In the *Local 199 U.A.W. Building Corporation* case, [1977] OLRB Rep. July 472 the Board set out the steps that should be taken as follows:

“The following steps should be taken by an organization wishing to establish its status as a trade union within the meaning of the Act.

1. A constitution should be drafted setting out, among other things, the purpose of the organization (which must include the regulation of labour relations) and the procedure for electing officers and calling meetings;
2. the constitution should be placed before a meeting of employees for approval;
3. the employees attending such meeting should be admitted to membership;
4. the constitution should be adopted or ratified by the vote of said members;
5. officers should be elected pursuant to the constitution.”

5. The Board requires compliance with its procedures in order that it may be assured that the organization is a viable organization capable of representing the membership in collective action and in their relationship with the employer concerned.

6. The evidence is that at a meeting held among the guards on January 6, 1979 a motion was passed that a union be formed. At that meeting Mr. Brearley was elected President of the union to be formed. A Secretary-Treasurer and a Vice-President were also elected.

7. The foregoing persons were instructed through a motion duly passed to prepare a Constitution and Bylaws for the union.

8. The Constitution and Bylaws were drawn up and a copy was filed with the Board. The document meets the requirements set out in step one of the above-cited case.

9. The Constitution was not placed before a meeting of employees for approval. Each employee was approached individually and simply shown a copy of the Constitution before he was asked to sign a card. It was submitted that the signing of the cards after having read the Constitution amounted to approval of the Constitution by the membership, since had they not approved they would not have become members.

10. It is clear, in any event, that the Constitution was not adopted or ratified by a vote of the members as required in item 4 above.

11. Furthermore, the officers were not confirmed or elected pursuant to the Constitution which, of course, had not been ratified. There was thus failure to comply with the final item set out above.

12. The evidence was that those charged with the organization of the employees followed the Guide to the Ontario Labour Relations Act where it sets out what a group of employees must do to form an organization that will be eligible for trade union status. Lest there be left any suggestion that the applicant was misled by the Guide, we set out below what the Guide indicates is the normal procedure:

“... The normal, correct procedure is as follows: the employees proposing to form a trade union hold a meeting; the employee group votes to approve a constitution; then, the employees involved become members; and finally, the members vote to ratify the constitution. Then they elect officers of the union to administer its business and represent it ...”

13. In the result, the Board finds that the applicant has failed to establish its status as a trade union within the meaning of section 1(1)(n) of the Act.

14. The application is accordingly dismissed.

0225-79-R International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Applicant), v. **Northern Telecom Canada Limited**, (Respondent), v. United Electrical, Radio and Machine Workers of America (UE), (Intervener), v. Group of Employees, (Objectors).

Certification – Practice and Procedure – Timeliness – Application filed one day prior to declaration terminating bargaining rights issuing – whether untimely – section 92(3)(a) applied.

BEFORE: M. G. Picher, Vice-Chairman, and Board Members O. Hodges and E. C. Went.

APPEARANCES: *H. Carl Anderson and Ms. Lorna J. Moses for the applicant; F. R. Von Veh, Steven J. McCormack and G. P. Shanahan for the respondent; Arthur E. Jenkyn for the intervener; Cathryn Longbottom and Victor Rabson for the objectors.*

DECISION OF THE BOARD; June 5, 1979

1. The name: “Northern Telecom Limited” appearing in the style of cause of this application as the name of the respondent is amended to read: “Northern Telecom Canada Limited”.

2. This is an application for certification.

3. The Board finds that the applicant (“the U.A.W.”) is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.

4. Having regard to the agreement of the parties, the Board further finds that all employees of the Respondent at its manufacturing divisions in the Regional Municipality of

Peel, save and except section managers, persons above the rank of section manager, registered nurses, professional engineers, and employees covered by subsisting collective agreements between the Respondent and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 1535 (technical, office and clerical), between the Respondent and the International Union of Operating Engineers, Local #796 (operating engineers), and employees covered by subsisting collective agreement between the Respondent and the Communication Workers of Canada, Local C9, students employed under a co-operative university program, and members of the personnel department, secretaries to the manufacturing manager or equivalent or higher, and secretaries to managers reporting directly to the manufacturing manager or equivalent and specialists performing functions in purchasing, business systems, auditing, control/accounting, marketing and installation, constitute a unit of employees of the respondent appropriate for collective bargaining.

5. Statements of desire signed by some 215 employees in the bargaining unit were filed in opposition to the application. Since the overlap in the names of employees who signed both the petition and membership documents in the union was not sufficient to cast doubt upon the union's membership strength so as to cause the Board to order the taking of a representation vote, the Board did not conduct an inquiry into the origination and circulation of the petition.

6. The intervener ("the U.E.") submitted that the application which was filed on May 2, 1979, was untimely and should therefore be dismissed. In dealing with that issue it is useful to review the background to this application and the pertinent sections of The Labour Relations Act.

7. The U.E. is the predecessor holder of the bargaining rights that are the subject of this application. On February 21, 1979 Mr. Peter Bellion, an employee of the respondent, filed an application under section 49 of the Act on his own behalf and on behalf of other employees in the bargaining unit for a declaration terminating the bargaining rights of the U.E. The Board ordered that a representation vote be held among the employees in the bargaining unit. The results of the vote, taken April 23, 1979, were unfavourable to the U.E; 515 ballots were cast against it, with 418 in its favour. All parties to the termination application received that information in the form of the returning officer's report dated April 23, 1979. At that time, subject to some objection being taken to the regularity of the vote, the Board would issue a formal determination that more than 50 per cent of the ballots cast were marked against the incumbent union and that its bargaining rights were therefore terminated. Objections to the regularity and sufficiency of the balloting were waived in writing by the representatives of all parties on the day of the vote and thereafter no objections were filed within the objection period which ended on May 1, 1979. The Board's formal decision declaring that the U.E. no longer represents the employees of Northern Telecom Canada Limited in the Regional Municipality of Peel and York issued on May 3, 1979, one day after the instant application for certification was filed.

8. Technically on May 2, 1979 the U.E. was the exclusive bargaining agent of the employees in the bargaining unit. The U.E. had been negotiating the renewal of its collective agreement and a conciliation officer was appointed on April 25, 1979. The U.E. maintains that by the operation of section 53 of the Act the open period during which an application for certification could be filed had ended with the appointment of the concilia-

tion officer. Within the framework of section 53 of the Act, read in isolation, that is true. But it is also true that the way was opened to an application for certification as soon as the U.E.'s bargaining rights were extinguished on May 3, 1979. That inevitable result was known to all of the parties as of April 23, 1979. The issue is whether the wishes of the employees for collective bargaining representation by the U.A.W. should be defeated, and all of the employees be left with no union representation whatsoever, merely because this application was filed one day early.

9. Neither the justice of the case nor the scheme of the Act dictate that result. The Act provides for the protection of the rights of unions when they have made an application for certification and the status of their bargaining rights is pending, as well as when they exercise existing bargaining rights, whether they hold those rights through a Board certificate or by the operation of a collective agreement. Section 53 of the Act provides for periods of time during which a union's bargaining rights may not be made the subject of attack either by an application for the termination of bargaining rights or by an application for the displacement of those rights to another union. But the Act itself anticipates that in certain situations the inflexible application in all cases of the prescribed time limits could operate unfairly to the detriment of both an applicant union and the employees in a bargaining unit. It therefore provides the mechanism to relieve from undue hardship through section 92(3) of the Act which provides:

"92 (3) Notwithstanding sections 5 and 49, where an application has been made for certification of a trade union as bargaining agent for employees in a bargaining unit or for a declaration that the trade union no longer represents the employees in a bargaining unit and a final decision of the application has not been issued by the Board at the time a subsequent application for such certification or for such a declaration is made with respect to any of the employees affected by the original application, the Board may,

- (a) treat the subsequent application as having been made on the date of the making of the original application;
- (b) postpone consideration of the subsequent application until a final decision has been issued on the original application and thereafter consider the subsequent application but subject to any final decision issued by the Board on the original application; or
- (c) refuse to entertain the subsequent application."

By overriding the provisions of sections 5 and 49 of the Act, which include the timeliness provisions of section 53, section 92(3) of the Act gives the Board the discretion to deal flexibly with overlapping applications notwithstanding the time limits set out elsewhere in the Act.

10. In this case an application for the termination of bargaining rights was made by a group of employees and a final decision of that application had not been issued by the Board at the time that this subsequent application for certification was filed. Given that the results of the termination vote were known to all parties and that no objections to the regularity of those proceedings had been filed within the prescribed time, the Board's final order

formally terminating the bargaining rights of the U.E. was a foregone conclusion. In these circumstances there is no value, from the standpoint of the advancement of the interests of collective bargaining, to dismiss the U.A.W.'s application for the purely technical reason that it was filed one day early. This is manifestly the kind of situation where the Board's discretion in respect of time limits should be exercised to give the applicant a full and fair opportunity to have its application processed.

11. For the foregoing reasons, pursuant to section 92(3)(a) of the Act, the Board treats the instant application for certification as having been made on February 21, 1979, the date of the original application for the termination of the U.E.'s bargaining rights, and a date at which an application for certification would have been timely. The intervener's objection to the timeliness of this application is therefore dismissed.

12. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on May 11, 1979, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

13. A certificate will issue to the applicant.

0362-78-R Ontario Hydro Employees Union, Local 1000, (Applicant), v. Ontario Hydro, (Respondent), v. Canadian Union of Operating Engineers & General Workers, (Intervener # 1), v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada, (Intervener # 2).

Build-Up – Certification – Reconsideration – Build-up occurring earlier than employer first anticipated – whether grounds for reconsideration.

BEFORE: Ian C. A. Springate, Vice-Chairman and Board Members C. G. Bourne and W. Rutherford.

APPEARANCES: *C. M. Mitchell and M. A. Bell for the applicant; C. F. Murray, J. W. Lawson and R. A. Abbott for the respondent; Douglas J. Wray and Kenneth Brown for Intervener # 1.*

DECISION OF THE BOARD; June 1, 1979

1. Intervener #1 has requested that the Board reconsider its previous decisions in this matter.

2. This is an application for certification in which the applicant was seeking to displace intervener #1 as the bargaining agent for certain employees of the respondent em-

ployed at the Keith generating station in Windsor. The application was filed on May 18, 1978, and a hearing into the application was held on June 5, 1978.

3. The Board's general practice in displacement situations is to direct the taking of a representation vote wherein employees are given an opportunity to choose between the applicant and the incumbent trade unions. At the hearing on June 5, 1978 counsel for intervenor #1 submitted that in this case such a vote should be deferred into the future due to a planned build-up in the number of employees at the Keith generating station. In response to this submission, counsel for the respondent informed the Board that it was the respondent's intention to begin increasing the number of employees at the generating station in August of 1979 so that by the end of 1979 some 75 to 100 additional employees would be working at the station.

4. In a decision dated August 14, 1978 (reported [1978] Aug. OLRB Rep. 754) the Board declined to postpone the taking of a representation vote. Its reasons for doing so centred around the fact that the respondent did not project commencing the build-up for a full year and even then the planned increase in staff was to occur over a period of several months.

5. A representation vote was conducted on September 6, 1978, at which time there were 11 employees in the bargaining unit eligible to cast a ballot. Of these 11 employees, 9 voted in favor of the applicant, one voted in favour of intervenor #1, and one did not vote. On the basis of this vote result, the Board on September 18, 1978 issued a certificate to the applicant. At a hearing held with respect to the request for reconsideration, the applicant and the respondent informed the Board that since the issuance of the certificate they have been conducting their affairs on the understanding that employees at the Keith generating station form part of a province-wide bargaining unit and as such are bound by the terms of a collective agreement.

6. The build-up at the Keith generating station began earlier than had originally been projected. There is no suggestion that the respondent sought to mislead the Board as to the timing of the build-up at the initial hearing. Instead, what occurred was that subsequent to the hearing the respondent revised its estimate as to the future demand for power, and as a result decided to place both its Hearn and Lennox generating stations "into cold storage." This decision resulted in a substantial number of employees at these two generating stations being made surplus. In January, 1979, the respondent decided to accelerate the build-up at the Keith generating station and to transfer to Keith some of the surplus employees from the other two stations.

7. As already noted, at the time of the taking of the representation vote in September of 1978 there were 11 employees in the bargaining unit. This number was increased to 15 in December, 1978 with the addition of four electrical and instrument apprentices who were assigned to the station for training purposes. The build-up of employees at the Keith generating station originally projected to begin in August, 1979 actually got under way during or shortly after the month of January, 1979. By March 14, 1979 there were approximately 30 bargaining unit employees at the Keith station, more than double the number when the representation vote was conducted in September, 1978. It is this acceleration in the build-up which intervenor #1 contends justifies a re-opening of the proceedings in this matter. Counsel for intervenor #1 submitted that once the number of employees at the

Keith generating station reaches 40, the Board should direct the taking of a new representation vote.

8. If in August, 1978 the Board had been aware of how soon the build-up of employees would actually begin, it may or may not have decided to defer the representation vote. The Board did, however, act on the then current projections. Since that time a representation vote has been conducted and on the basis of that vote a certificate issued to the applicant. Further, since the issuance of the certificate in September, 1978 the applicant and respondent have been governing their affairs on the basis of that certificate. As the Board noted in the *Journal Publishing Company* case, [1977] OLRB Rep. Sept. 549, there is a real need for certainty and finality in proceedings where representation rights are in issue. Lacking such finality parties would never be certain as to how much reliance could be placed on a Board certificate. Having regard to this need for certainty and finality, we do not feel that the changes in the respondent's staffing plans which occurred subsequent to the issuance of the certificate form a sufficient basis for now reopening this matter and directing a new representation vote in place of the one conducted on September 11, 1978.

9. The application for reconsideration is accordingly dismissed.

1743-78-M The Canadian Union of public Employees, and its Local Number 1189, (Applicant), v. **The Corporation of the City of Owen Sound**, (Respondent).

Employee – Section 95(2) – Whether employed in confidential capacity in matters relating to labour relations – access to confidential matters not relating to labour relations – whether excluded.

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members F. W. Murray and O. Hodges.

DECISION OF THE BOARD; June 20, 1979

1. This is an application under Section 95(2) of the Act in which the Board is asked to determine whether or not Ms. Gale Perkins is an employee within the meaning of the Act. In a decision dated February 5, 1979 the Board appointed a Labour Relations Officer to meet with the parties and inquire into the duties and responsibilities of Ms. Perkins. The Board is now in receipt of the report of the Labour Relations Officer in this matter.

2. Section 1(3)(b) of the Act provides

“1. (3) Subject to section 80, for the purposes of this Act, no person shall be deemed to be an employee,

(b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.”

The purpose of the section is to ensure that the persons who are within a bargaining unit deemed appropriate for collective bargaining do not find themselves faced with a conflict of interest as between their responsibilities and obligations as persons who "exercise managerial functions or are employed in a confidential capacity in matters relating to labour relations" and their responsibilities and obligations as members of the bargaining unit. The Board in examining the duties and responsibilities of the person(s) whose employee status is disputed must look to the potential conflict of interest, and having regard to the purpose of the section, exclude from the operation of the Act any person whose duties and responsibilities as of the date of application would place them in such a position.

3. The Board jurisprudence with respect to the interpretation of section 1(3)(b) as it relates to persons "employed in a confidential capacity in matters relating to labour relations" has been capsulized in the *York University* case, [1975] OLRB Rep. Dec. 945 at page 951.

"... That is to say the Board must be satisfied of 'a regular, material involvement in matters relating to labour relations' to justify a finding excluding a person from operation of the Act. (See, *The Falconbridge Nickel Mines Ltd.* case OLRB M.R. September [1969] 379). Mere access to confidential information that may pertain to labour relations, standing alone, is no reason for excluding employees from the bargaining unit. (*The Metropolitan Separate School Board* case OLRB M.R. April [1974] 220). Nor is mere knowledge of matters that may be deemed 'confidential' in the sense that the employer would not approve of the disclosure of such information by his employees sufficient to justify a positive finding under section 1(3)(b). (See *The Comtech Group Limited* case OLRB M.R. May [1974] 291). The important test is whether there is consistent exposure to confidential information on matters relating to labour relations so as to constitute such exposure an integral part of the employees' service to the employer's enterprise. (See *The Toledo Sale Division of Reliance Electric Limited* case OLRB M.R. June [1974] 406)."

The Board stated in the *Falconbridge* case [1966] OLRB Rep. Sept. at page 379 that an exclusion based on "confidential capacity" must follow from –

"... a regular material involvement in matters relating to labour relations which are confidential because their disclosure would adversely affect the interest of the employer ..."

4. The Board has reviewed the evidence pertaining to Ms. Perkins' duties and responsibilities and must conclude that although privy to information in the course of her regular duties which is confidential in the sense that it should not be divulged to the public, Ms. Perkins is not employed in a confidential capacity within the meaning of section 1(3)(b). Ms. Perkins works as the secretary to the Industrial Commissioner. The Industrial Commissioner is charged with attracting industry to Owen Sound. Ms. Perkins opens and files his incoming correspondence, types outgoing correspondence, minutes of meetings of the Industrial Commission and the departmental budget. In addition, she performs general receptionist and secretarial functions. The budget pertains to the operation of the Industrial Commissioner's office and sets out anticipated travel, advertising, office and salary expenses. The salaries listed are those of Ms. Perkins and the Industrial Commissioner. The evi-

dence establishes that the Industrial Commissioner's salary is a matter of public knowledge. Ms. Perkins has no involvement in either the negotiation or administration of the collective agreement. She is not privy to information which would create for her a potential conflict of interest if found to be an employee within the meaning of The Labour Relations Act. Having regard to all of the evidence, the Board hereby finds that although Ms. Perkins is privy to confidential information in the course of her regular duties, she is not employed in a confidential capacity in matters relating to labour relations and is, therefore, an employee within the meaning of The Labour Relations Act.

0297-79-U The Association of Canadian Film Crafts People, (Applicant), v. **Purple Heart Film Corporation** and Motion Picture Studio Production Technicians, Local 873, (I.A.T.S.E.), (Respondents).

Lock-Out – Parties – Trade Union Status – application may only be filed by, inter alia, a trade-union – applicant not constituting itself as a trade union – application dismissed.

BEFORE: Ian C. A. Springate, Vice-Chairman

APPEARANCES: *H. M. Pollit, Hilton Rosemarin and J. M. Bradette for the applicant; Roy C. Fillion, J. Fisher and David Main for the respondent Purple Heart Film Corporation; C. M. Mitchell and H. Montgomerie for the respondent I.A.T.S.E.*

DECISION OF THE BOARD; June 5, 1979

1. This is an application for relief under section 83 of The Labour Relations Act wherein the applicant is requesting that the Board issue a direction with respect to an alleged threat of an unlawful lock-out.

2. Section 83 on its face stipulates that an application under that section can be brought only by a trade union, a council of trade unions, an employer or an employers' organization. In its filings the applicant claimed to be a trade union, although it had not in any previous proceedings before the Board established its status as a trade union within the meaning of section 1(1)(n) of the Act. At the hearing the applicant sought to establish its status as a trade union through the introduction of evidence relating to both its formation and manner of operation.

3. The evidence led by the applicant establishes that it was the intent of a number of individuals to bring into existence either a trade union or a professional association similar in certain respects to a trade union. The Board is not satisfied, however, that the steps actually taken to accomplish this result were sufficient to constitute the applicant as a trade union within the meaning of section 1(1)(n) of the Act.

4. This determination that the applicant is not a trade union does not foreclose the possibility that the necessary steps might yet be taken to bring into existence a trade union bearing the name of the applicant. The Board's decisions in *Local 199 U.A.W. Building*

Corporation, [1977] OLRB Rep. July 472 and *Adath Israel Congregational School*, [1978] OLRB Sept. 797 may well be of some assistance in this regard. Reference should also be made to sections 12 and 40 of the Act which stipulate that trade unions which discriminate against people on the basis of their nationality, ancestry or place or origin can neither be certified by the Board nor enter into valid collective agreements. The membership requirements contained in the document relied upon by the applicant as its constitution may well have the effect of discriminating on these grounds. In addition, the dispute settlement procedures stipulated in this document should be examined in light of those sections of the Act which deal with the timeliness of lawful strike activity.

5. In that the applicant did not establish that it is a trade union, it cannot request relief under the procedures set forth in section 83 of the Act. This does not, however, mean that the alleged unlawful acts of the respondents cannot be raised before the Board. The general procedure for raising allegations of unlawful conduct and requesting remedial relief from the Board is set forth in section 79. Section 79 does not contain the same limitations on who can bring a complaint as are contained in section 83.

6. In that the applicant is not entitled to bring an application for relief under section 83, this application is hereby dismissed.

0147-79-R Teamsters Local Union No. 419, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant), v. **Ralston Purina Canada Inc.** (Respondent), v. International Personnel Ltd., (Intervener # 1), v. American Federation of Grain Millers, (Intervener #2).

Certification – Employee – Personnel supply company providing workers to Respondent – Whether Respondent or personnel company employer.

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members D. B. Archer and F. W. Murray.

APPEARANCES: *Ken Petryshen and Al Lefort for the applicant; John T. Morin and Laurie Stevens for the respondent; Roy C. Filion and Allen V. Craig for intervener #1; Larry McCombs for intervener #2.*

DECISION OF THE BOARD; June 5, 1979

1. The name “Ralston Purina of Canada Ltd.” appearing in the style of cause of this application as the name of the respondent is amended to read: “Ralston Purina Canada Inc.”

2. This is an application for certification.

3. The respondent takes the position that it does not employ the persons for whom

the union seeks bargaining rights. The respondent argues that these persons are properly employees of International Personnel Ltd. International Personnel, on the other hand, maintains that these persons are employees of Ralston Purina. The facts giving rise to this dispute as put before the Board by counsel for the parties may be summarized as follows. Ralston Purina is party to a verbal agreement with International Personnel under which International Personnel assigns persons who are selected by Ralston Purina to work for Ralston Purina at a leased facility in Mississauga. International Personnel is responsible for paying these persons an hourly rate agreed to in negotiation with Ralston and for providing and administering the benefit plans covering these persons. The Unemployment Insurance premiums and Ontario Health Insurance Plan premiums are paid through International Personnel on behalf of these persons. International Personnel is paid a fee by Ralston which allows it to recoup its costs and to realize a profit. The persons supplied by International Personnel work for Ralston, are supervised by employees of Ralston and may be terminated by Ralston. The facility at which these persons work is a temporary facility. The company occupies a permanent facility in Mississauga for which the Grain Millers Union holds bargaining rights covering that specific location. The officials of Ralston were never of the view that the persons supplied by International Personnel to work at its temporary location were its employees.

4. Counsel for the respondent acknowledged that all of the relevant facts were before the Board. He argues that the persons for whom the union seeks bargaining rights are employees of International Personnel and relies upon the *Templet Services* case, [1974] OLRB Rep. Sept. 606, an application for certification in which the Board found that persons supplied to work on a construction site and paid by an organization named Manpower Services (Ottawa) Limited, although supervised by employees of the respondent, were in fact employees of Manpower. The Board found on the facts of that case that "the overriding control of their work clearly resides in Manpower." Counsel for International Personnel argues that control of the work of the persons who are the subject of this application does not reside with International Personnel and asks the Board to find on an application of the criteria set out in the *York Condominium Corporation* case [1977] OLRB Rep. Oct. 645 and the cases cited therein that International Personnel is not the employer. He characterized International Personnel as a payroll agent.

5. The Board is satisfied in this case that Ralston Purina hires, supervises and disciplines the persons with whom we are concerned. These persons perform work for Ralston. While Ralston does not pay these persons directly they are paid indirectly by Ralston in an amount agreed by Ralston for the hours of work performed by them for Ralston. This case is clearly distinguishable from the *Templet Services* case (supra) relied upon by the respondent in that the overriding control of the work of those who are the subject of the application rests with Ralston. The Board can come to no other conclusion on an application of the principles set out in the *York Condominium* case (supra) than that the persons who are the subject matter of this application are employees of Ralston Purina. Reference may also be had to re *United Automobile Workers Local 1566* and *Wean-McKay of Canada Ltd.* (1971) 23 L.A.C. 27 (Palmer) and *Board of Governors of Riverdale Hospital and C.U.P.E. Local 79* (1974) 7 L.A.C. (2d) 40 (Schiff), arbitration cases in which it was found that persons assigned by a placement agency were in fact employees of the employer party to the collective agreement.

6. The fact that the facility at which these persons work is a temporary facility does

not alter the result. The employees who work at this facility, whether temporary or permanent, are employees of Ralston and are entitled to seek to bargain collectively under the Act.

7. Having regard to the bargaining rights held by the American Federation of Grain Millers in respect of employees of the respondent located at 2550 Royal Windsor Drive in Mississauga, we hereby find as the appropriate bargaining unit in this case all employees of the respondent at 2265 Royal Windsor Drive, Mississauga, save and except foremen, those above the rank of foreman, office and sales staff and those covered by subsisting collective agreements.

8. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on May 2, 1979, the terminal date fixed for this application and the date which the Board determines under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

9. A certificate will issue to the applicant.

1941-78-U 1942-78-U London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Complainant), v. **Rest Haven Nursing Home of St. Williams 1974 Ltd.**, (Respondent).

Change in Working Conditions – Reducing working hours – Eliminating classification – whether statutory freeze violated.

BEFORE: M. G. Picher, Vice-Chairman, and Board Members J. D. Bell and O. Hodges.

APPEARANCES: *Ted Wohl and John Askin for the complainant; James E. Bowden and H. Chambers for the respondent.*

DECISION OF M. G. PICHER, VICE-CHAIRMAN AND BOARD MEMBER O. HODGES; June 25, 1979.

1. These complaints were filed under section 79 of The Labour Relations Act, alleging violations of section 10 of The Hospital Labour Disputes Arbitration Act. The Board orders that the complaints be and the same are hereby consolidated.

2. The respondent is a Nursing Home situated in the St. Thomas area to which the provisions of The Hospital Labour Disputes Arbitration Act apply. Section 10 of the Act provides:

“10. Notwithstanding subsection 1 of section 70 of *The Labour Relations Act*, where notice has been given under section 13 or 45 of that

Act by or to a trade union that is the bargaining agent for a bargaining unit of hospital employees to which this Act applies to or by the employer of such employees and no collective agreement is in operation, no such employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees, and no such trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees, until the right of the trade union to represent the employees has been terminated.”

3. In February, 1979 the respondent made two staffing changes; it replaced a registered nursing assistant (R.N.A.) on one of its shifts with a registered nurse (R.N.), and it reduced the number of nurse's aides on weekend duty. The complainant alleges that in making those changes it altered a term or condition of employment or a right or privilege of the three named grievors, Linda Archibald, Cathy McIntyre and Anita Verboven, contrary to section 10 of The Hospital Labour Disputes Arbitration Act.

4. The complainant was certified on May 31, 1978 as the bargaining agent for a unit of full-time employees and for a separate unit of part-time employees of the respondent. The grievor Linda Archibald is a member of the full-time unit. The grievors Cathy McIntyre and Anita Verboven were at all times material to their complaint members of the part-time unit. On or about June 29, 1978, the complainant gave the respondent notice under section 13 of The Labour Relations Act of its desire to bargain for both of the bargaining units. As of the date of this application, the parties were still in the process of negotiating their first collective agreement. The parties are in agreement, therefore, that the actions of the respondent occurred within the statutory freeze period set out in section 10.

5. The respondent commenced operations as a nursing home in June of 1975. Its nursing care is provided through three shifts – day, evening and night. The staffing situation that prevailed at the time of the union's certification and of its giving notice to bargain was as follows: the respondent employed a registered nurse and four nurse's aides on the day shift. On weekends the respondent scheduled a fifth nurse's aide on the day shift. An R.N.A. and three aides worked the evening shift. An R.N.A. and two aides were scheduled for night shift. The respondent also maintained an R.N. on call on both the evening and night shifts in case of any contingency which would require the services of an R.N.

6. Linda Archibald worked as one of the two full-time R.N.A.'s employed by the respondent on the evening and night shifts. Cathy McIntyre worked first as a full-time nurse's aide and later in the fall of 1978 became a member of the part-time unit, working as one of the five aides employed on the weekend day shift. Anita Verboven is a member of the part-time unit and was, at the time of the notice to bargain, working full-time during the school vacation period. She worked as one of the five aides on the weekend day shift during the remainder of the year.

7. In September 1978 the respondent's other full-time R.N.A. resigned. The respondent then decided not to hire another full-time R.N.A., but rather to fill the position with an R.N., a designation not included in the bargaining unit. The union did not complain about

this action. However, at that time, the issue as to whether the R.N.A's were employees for the purpose of The Labour Relations Act was still pending before the Board. Hence, it was not clear, at that time, whether R.N.A's were included in the bargaining unit. In a decision dated December 19, 1978 (*Rest Haven Nursing Home* [1978] OLRB Rep. Dec. 1137), the Board held that the two full-time R.N.A's did not exercise managerial functions and were thus included in the bargaining unit.

8. In January 1979, the respondent, through its owner, Hubert Chambers, gave notice to the union that it would be staffing both its afternoon and night shifts with an R.N. instead of an R.N.A. The union objected to this staffing change. In February 1979, Mrs. Archibald, the only remaining full-time R.N.A., was advised that, as of the beginning of March, she would no longer be employed as an R.N.A., but that she would be scheduled to work on all three shifts as a nurse's aide and be paid 90¢ less per hour. The respondent, as of the beginning of March, has staffed all three of its nursing shifts with R.N.'s and has eliminated the need to have R.N.'s on call during afternoon and night shifts. That staffing change is the basis of the complaint contained in Board File No. 1942-78-U.

9. The other complaint, File No. 1941-78-U, centres on the action taken by the respondent in February, 1979. In that month the respondent decided to reduce the number of aides scheduled to work on the weekend day shift from five to four. The reduction to four aides has resulted in a decrease in scheduled hours for the grievors who work as part-time aides. Whereas the grievors had previously worked regularly on both the Saturday and Sunday shifts, they presently are only scheduled for one 8 hour shift per weekend, or are sometimes not scheduled to work the weekend at all. The complainant alleges that this staffing change also constitutes a violation of section 10 of The Hospital Labour Disputes Arbitration Act.

10. The purpose of the section 10 freeze is to provide a period of stability during which the parties are to bargain towards the negotiation of a collective agreement. The question of motive is not relevant in determining whether a violation of section 10 has occurred. That is to say, the Board confines itself to a consideration of whether a right, privilege or term or condition of employment has been altered, regardless of the motivation for that alteration. (See *Wellesley Hospital*, [1976] OLRB Rep. July 364; *Beaver Electronics Limited* [1974] OLRB Rep. Mar. 120.)

11. In determining whether or not there has in fact been an alteration in violation of the freeze, the Board looks to whether the employer has during the period of the freeze conducted its "business as before". The Board's approach in this regard was recently expressed in *Spar Aerospace Products Limited*, [1978] OLRB Rep. Sept. 859 at 863:

"23. The "business as before" approach does not mean that an employer cannot continue to manage its operation. What it does mean is simply that an employer must continue to run the operation according to the pattern established before the circumstances giving rise to the freeze have occurred, providing a clearly identifiable point of departure for bargaining and eliminating the chilling effect that a withdrawal of expected benefits would have upon the representation of the employees by a trade union. The right to manage is maintained, qualified only by the condition that the operation be managed as before. Such a condi-

tion, in our view, cannot be regarded as unduly onerous in light of the fact that it is management which is in the best position to know whether it is in fact carrying out business as before. This is an approach, moreover, that cuts both ways, in some cases preserving an entrenched employer right and in other cases preserving an established employee benefit.”

12. The respondent’s decision to replace R.N.A.’s with R.N.’s was characterized by its counsel as the bumping of an R.N.A. by an R.N. on the two later shifts, with the opportunity granted to the R.N.A. for alternative employment.

13. The Board is of the opinion, however, that the correct characterization of the respondent’s actions is the elimination of a classification of bargaining unit employees by the introduction of a new classification on the shifts in question. The employer’s actions must be viewed in the context of what has taken place over the entire period of the freeze. The respondent has effectively eliminated the classification of R.N.A. from the bargaining unit. The parties are in agreement that no anti-union animus precipitated this move. However, it is not the reason behind the move but the effect of the action itself which must be analyzed. In this instance an entire classification of employees in the bargaining unit has been eliminated, not because of a change in the job function engaged in by those employees, but rather because of a decision to assign that job function to a different group of employees. This is not, in the opinion of the Board, “business as before.”

14. The Board’s decision does not rest upon the fact that the new employees are outside the bargaining unit. Nor is it particularly significant that the R.N.’s perform additional functions and perhaps exercise more responsibility than R.N.A.’s. Furthermore, the fact that the staffing change affected only one employee rather than a group is of little consequence. The significant feature is the respondent’s alteration of its practice, clearly established from the time its operations began, of employing R.N.A.’s rather than R.N.’s to staff its evening and night shifts.

15. The Board accepts that this alteration was for good business reasons. The Board also accepts that the employer must be free to manage its operations in the most efficient manner and with enough flexibility to fit those operations to suit changing conditions and circumstances. However, this freedom must be balanced against the right of the trade union to have the employment relationship which is the subject of negotiations stabilized during the period of the freeze. It is not unduly onerous that the employer be required to wait until the expiration of the freeze period to make fundamental changes in its staffing policies. The Board in *AES Data Limited*, File No. 2023-78-U, decision dated May 8, 1979, described the rationale behind the freeze in section 70 of The Labour Relations Act in the following way:

“The purpose of section 70 is to maintain the prior pattern of the employment relationship, in its entirety, while the parties are negotiating for a collective agreement. This ensures that they will have a fixed basis from which to begin negotiations, and prevents unilateral alterations in the status quo which might give one party an unfair advantage either from the point of view of bargaining or of propaganda.”

16. In this case the eradication of one of the two categories of employees in the bar-

gaining unit during the freeze period virtually restructures the framework for bargaining. The elimination of an entire job classification, which is one of only two classifications in the bargaining unit, has the effect of altering the point of departure for negotiations. It gives the employer the unfair advantage of being able to change the rules of the game during the first inning. The employer may be able to bargain that result during negotiations or implement it during the life of a collective agreement pursuant to its management's rights, but it is a departure from the scheme of the Act for it to do so unilaterally during the freeze period. The Board therefore finds that the respondent's elimination of the classification of R.N.A. from the bargaining unit was in breach of section 10 of The Hospital Labour Disputes Arbitration Act.

17. For the foregoing reasons the Board orders that the grievor, Lynda Archibald, be restored to her former position of Registered Nursing Assistant forthwith with full compensation for wages and benefits lost from the date of her reclassification to the date of her reinstatement. Since the Board has been asked to make an order only with respect to the named grievor it makes no order with respect to the other R.N.A. position.

18. We turn now to consider the complaint of the other two grievors. The Board does not view this complaint in the same light as that of Mrs. Archibald. In the context of bargaining for a first collective agreement there is a difference between the elimination from the bargaining unit of an entire job classification, and the reduction in the number of employees scheduled to work on a particular shift. Subject to restrictions which may be contained in collective agreements or which may be entrenched through prior conduct, the employer must have the right to increase or decrease the work-force as conditions dictate.

19. The issue is whether in reducing the number of aides on the weekend day shift from five to four, the employer is conducting business as before. The evidence at the hearing revealed a prior juggling of part-time employees to fill gaps in the employer's schedule. Although the particular employees who are the subject of this complaint had not, in the past, been subject to this movement, nevertheless it must be kept in mind that the freeze does not attach to a particular employee but rather to the totality of the employment relationship of which the grievors form a part. The union is entitled to insist that the employer conduct its handling of part-time employees in the same manner as before, but not necessarily that the schedules of individual employees be frozen, or that employees be assigned the same amount of hours throughout the period of the freeze when there has been a general pattern of flexibility in that regard before.

20. The evidence before us indicates that the students were hired to complement the respondent's schedule on weekends. While no promise was ever made to them they came to expect certain hours of work because of the routine which had prevailed for some time. However, that routine cannot be said to vest in the grievors any particular right to be scheduled those hours. Due to the scheduling of the other part-timers, the respondent was able to accommodate the grievor's desire to work both Saturday and Sunday. However, for legitimate business reasons, both grievors are no longer required to work both shifts and have been scheduled accordingly. The Board finds that this is consistent with the terms upon which they were hired. Accordingly, the Board finds that this re-scheduling does not constitute a breach of section 10 of The Hospital Labour Disputes Arbitration Act and the Board hereby dismisses the complaint with respect to the grievors Cathy McIntyre and Anita Verboven.

21. The Board shall remain seized of the matter with respect to Mrs. Archibald in the event that the parties are unable to agree on the terms of her reinstatement or on the quantum of compensation.

DECISION OF BOARD MEMBER J. D. BELL:

1. I do not agree with the decision of the majority of the Board File No. 1492-78-U that the replacing of an R.N.A. (Lynda Archibald) with a Registered Nurse should be construed as a breach of section 10 of The Hospital Labour Disputes Arbitration Act.

2. The majority decision has detailed the facts surrounding this action and I will not repeat them. However, I disagree with the reasoning that this move to upgrade the care offered on the second and third shift of the Nursing Home violates the statute. To say that the effect of the action must be analyzed and the reason for the action should be ignored is wrong.

3. Any action taken should be for a reason and in cases such as this it should be a good sound reason. I can think of no better reason than to upgrade the quality of the Health Service care offered by the respondent Nursing Home by engaging a more highly trained person to fill the position of supervisor on the off shifts.

4. The majority has agreed that this move was for good business reasons but then requires the employer to wait until some unknown date in the future – the end of the freeze period which could be months away – before making this basic and desirable change in structure to improve the care offered.

5. I believe this is a very narrow technical interpretation of section 10 of The Hospital Labour Disputes Arbitration Act which has a negative effect in the health care field.

1897-78-R Hotel & Restaurant Employees & Bartenders Union, Local 604, A.F.L., C.I.O., C.L.C., (Applicant), v. **Rock Haven Motels (Peterborough) Limited**, (Respondent), v. Group of Employees, (Objectors).

Certification – Interference in Trade Union – Employer threatening to close business if union successful – section 7a applicable.

BEFORE: R. O. MacDowell, Vice-Chairman and Board Members C. G. Bourne and M. J. Fenwick

APPEARANCES: *Ian Roland and Florence Fortune for the applicant; W. J. McNaughton, C. Burton and B. Whiteman for the respondent.*

DECISION OF THE BOARD; June 13, 1979

1. This is an application for certification

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.

3. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent in Peterborough, Ontario, regularly employed for more than twenty-four (24) hours per week, save and except managers and those above the rank of manager, constitute a unit of employees of the respondent appropriate for collective bargaining.

4. When this matter first came on before the Board on March 5, 1979 the trade union challenged the accuracy of the list of employees which accompanied the employer's reply. On the basis of that list, and the documentary evidence of membership which the union filed, the union could not demonstrate that more than fifty-five per cent of the employees in the bargaining unit were members on the "terminal" date established pursuant to section 92(2)(j) of the Act, although it could demonstrate that more than forty-five per cent were members. The Board appointed an examiner to enquire into the list and composition of the bargaining unit. The examiner conducted a preliminary examination of the employer's records, which resulted in certain amendments to the employer's list, but it would appear that even if the remaining union challenges (concerning the employee status of certain persons) are successful, the union will still be unable to demonstrate a level of support, (i.e., more than 55 %) which would permit certification without a representation vote. Thus it would seem that the union remains in a "vote position" regardless of its challenges, but subject to the application of section 7a of the Act.

5. By letter dated February 26, 1979 the union made certain allegations of employer misconduct which it subsequently particularized and which, it is argued, support the issuance of a certificate pursuant to section 7a of the Act. It is contended that this misconduct not only involves a breach of the Act, but also that as a result thereof, the true wishes of the employees are now not likely to be ascertained by a representation vote. The parties agreed to postpone the final resolution of their dispute concerning the employee status of certain named individuals until the Board had heard the evidence and made its decision concerning the application of section 7a. This issue was not dealt with on March 5, but was put over to a later date so that the Board could hear full evidence and argument. The Board scheduled April 25 and 26 for a continuation of the hearing.

6. There was also filed with the Board a document in the form of a petition expressing opposition to the union's certification and purportedly signed by a number of employees of the respondent. Such statements (which are, of course, written hearsay) are not contemplated in The Labour Relations Act itself, but are contemplated by Rule 48 of the Board's Rules of Practice, and may prompt the Board to order a representation vote even though a trade union may have established that more than 55% of the subject employees are "members" within the meaning of section 1(1)(j) of the Act. Where a sufficient number of persons who meet the statutory requirement for "membership" subsequently have a "change of heart" and voluntarily signify in writing that they now wish to oppose the union's certification, the Board may exercise its discretion pursuant to section 7(2) of the Act to order a representation vote. Such petitions must comply with Rule 48 and, in order to ensure that the petition represents the voluntary wishes of employees free from the influence of management, the Board will generally conduct the enquiry contemplated by Rule 48(5) and hear evidence concerning the origination, preparation and circulation of the petition, and the

manner in which each signature was obtained. Ms. Sandra Hester appeared with counsel on March 5 and was presumably prepared to tender this evidence. The Board did not hear her evidence at that time because of the dispute concerning the employer's list, the discussions in respect thereof, and the appointment of an officer to clarify the matter. Ms. Hester received notice of, and was present for, the continuation of the hearing; however, she advised the Board that she was only present because of a subpoena, and that she had discussed the matter with her solicitor and had decided to take no further part in the proceedings – even though the section 7a issue remained to be dealt with. All parties were aware *prior* to March 5 that the union had alleged its entitlement to certification pursuant to section 7a, and that on March 5 this issue had not been resolved. The union's letter of February 26, 1979 was directed to the Registrar of the Board and, in accordance with its usual practice, was circulated to all of the parties on the record in advance of the March 5 hearing. Ms. Hester and her counsel knew, or ought to have known, that the resolution of this matter could result in the issuance of a certificate to the applicant. The purpose of the continuation of the hearing was to hear evidence on this very issue.

7. The notice of hearing and related documents were sent to Ms. Hester rather than to her solicitor (who had not so identified himself on the record.) In addition she did not receive a further exchange of correspondence between the union and the employer in which the respondent requested, and the union supplied, further particulars of the respondent's alleged misconduct. Neither solicitor sent a copy of these letters to Ms. Hester and since they were not addressed to the Registrar of the Board, the Board did not circulate them. Nevertheless, this did not concern Ms. Hester who assured the Board that she had no wish to take part in the "7a aspect" of the hearing and, but for the subpoena, she would not be present at all. She did not seek an adjournment, and had no wish to lead evidence on her own behalf. Since the decision not to participate was taken with the advice of her solicitor, and with the knowledge of the outstanding 7a issue, and since she reiterated her position at the continuation of the hearing, the Board decided to proceed.

8. The respondent operates a motor hotel in the City of Peterborough, employing approximately 35 full-time employees and 65 part-time "banquet staff" who are called in as and when required. The business is owned and operated by Mr. Carl Burton. Ms. Brenda Whiteman is the "manageress."

9. In February 1979 some of the respondent's employees decided to organize a trade union, apparently because they were concerned about their job security. The organizing campaign proceeded through the first two weeks of February and an application for certification was ultimately made on February 19th. The allegation of employer misconduct upon which the union relies began immediately before the certification application, and involves the interrogation of employees, threats of discharge and a closure of the business and participation in the circulation of anti-union petitions.

10. The Board heard the evidence of several witnesses. Much of the employer conduct was either admitted or not seriously in dispute. There were, however, some significant differences between the respondent's evidence and that of the applicant's witnesses. Our findings of fact, as set out hereunder, reflect our assessment of the totality of the evidence, the relative credibility of the various witnesses, and the reliability of their recollection of events.

11. On Saturday, February 17th, 1979, Mrs. Barbara Mutton was summoned to the respondent's office for a meeting with Mr. Burton and Ms. Whiteman. Burton told Mrs. Mutton that she had been identified by several employees as a union supporter, and asked her whether she had, in fact, signed a membership card. She was warned that if she wanted to protect her job she should reveal the name of the principal organizer. Burton said that he would "lock the doors" before he would deal with a union, that she would be fired "if she looked at a customer sideways", and implied that the union would not be able to protect her. Mutton admitted signing a membership card, and identified Marvin Davis as the employee from whom she had obtained cards. Mr. Burton subsequently left, leaving Mrs. Mutton alone with Ms. Whiteman, who continued what must be characterized as a cross-examination. Ms. Whiteman asked whether certain named individuals had signed cards, and told Mutton that *the union* had already identified another employee as the prime organizer. Moreover, Whiteman said, *the union* would shortly supply the respondent with a complete list of its members. These statements were untrue, but were designed to elicit the names of other union supporters.

12. Marvin Davis also testified about a meeting with Ms. Whiteman and Mr. Burton which Burton admitted occurred some 10 minutes after the meeting with Mrs. Mutton at which Davis had been identified as a union organizer. Burton and Whiteman apparently proceeded immediately to the cook's office, where they "confronted" Davis concerning his union activities, and advised him (as they had Mrs. Mutton) that other employees had singled him out as the organizer. Burton admits trying to "shake" Davis, warning that his union support could cost him his job, and seeking further information on the extent of the union's support. We are satisfied that he also told Davis (as he had told Mutton shortly before) that he would "close the doors before he would let a union in." Burton informed Davis that Ms. Whiteman would be available if he had anything further to say and, as before, left the employee alone with Ms. Whiteman. Whiteman continued to question Davis about the allegiance of a named employee, and a union meeting which had allegedly taken place two days earlier.

13. It is difficult to conceive of conduct more likely to undermine an organizing campaign than a specific threat to discharge those known to be union supporters, and a general threat to close down the business rather than deal with a union. In periods of high unemployment employees are especially vulnerable to threats of this nature, and their coercive effect is obvious. These threats represent a direct attack on employees' job security and a serious interference with their right to organize. It is not surprising, therefore, that when Marvin Davis advised his fellow employees of management's position they were deeply concerned. However, these are not the only incidents upon which the applicant relies.

14. On Saturday, February 18, Mrs. Mutton was called to Ms. Whiteman's office where she was asked to sign (and did sign) a typed statement in opposition to the union. This statement was generally similar in form and expression to the petition later submitted by Sandra Hester and mentioned *supra*; however, the actual document is not before the Board, so that we have only Mrs. Mutton's recollection of its contents. Before she left the office, Mrs. Mutton was asked to inform Sandra Hester that Ms. Whiteman wished to see her. Hester subsequently went to Whiteman's office and Marvin Davis joined them about twenty minutes later.

15. Davis testified that Whiteman questioned both himself and Hester concerning

whether they supported the union, and why, and who else had signed cards. Whiteman urged both of them to sign a statement in opposition to the trade union because, she said, their original decision to join a union had been ill considered, and she now wished to record the names of any employees having "second thoughts." She advised the two employees (as she had advised Mrs. Mutton the previous day) that the respondent would shortly receive a list of persons who had signed membership cards and that, in any case, one of their number had "ratted" on them, and revealed that they were union supporters. Again, this appears to have been a tactic designed to weaken the employees' confidence and induce them to reveal the names of other union members. It should be noted that although certain of Ms. Whiteman's remarks are quite similar to those which subsequently appeared in a letter allegedly emanating from Ms. Hester, and attached to her petition, Marvin Davis did not see, or sign, any document during the time he was in Whiteman's office.

16. Ms. Hester remained in Whiteman's office for approximately an hour after Davis left. After emerging she told him that she had signed a statement in opposition to the union. He subsequently learned that she was also organizing opposition to the union. This evidence is, of course, hearsay, but shortly thereafter there was a notice posted involving the formation of an employee association, and Ms. Hester did subsequently submit a petition in the form previously mentioned. Moreover, the Board is satisfied, having regard to the evidence of Shirley Grant, that Ms. Hester began circulating her petition on February 19, the same day as her meeting with Whiteman.

17. In his evidence, Mr. Burton candidly admitting instructing Ms. Whiteman to circulate a petition in opposition to the trade union, and to solicit employee support for such petition. He saw her type up a statement on Rock Haven stationary, to the effect that the employees did not wish to belong to the union. This statement is similar to that which appears as the heading of the Hester petition which, however, is *not* on Rock Haven stationary. A number of employees subsequently approached him and tendered various individually hand-written documents bearing the same message. Other employees asked if they could add their names to the written statements. Burton accepted the first 6 or 8 of these documents but refused to accept any more. He advised the Board that, at the time, he was unaware that these employer initiatives might be considered illegal. None of these individual employee statements were submitted to the Board. Presumably they have either been destroyed or remain in the possession of the respondent.

18. The evidence is clear and uncontradicted that the owner instructed Ms. Whiteman to solicit statements in opposition to the union, that she prepared a form of statement, and that thereafter a number of employees approached Burton with documents in the same general form as that which she had prepared, and which Mutton, Davis and Hester had been asked to sign. In our view this is no coincidence. It is difficult to resist the conclusion that Ms. Whiteman followed Burton's instructions, and that at least some of these statements were the results of her activities. The employees also may have been influenced by a rumour that the owner intended to run the business entirely with part-time personnel. Mr. Burton admitted that he had made this statement to another member of management, but he explained that it referred only to the course of action which he planned to take in the event of a strike. Even if we accept this explanation that the statement was taken out of context, the rumour would certainly have contributed to the employees' feeling of insecurity. The employer had, after all, already threatened to discharge known union supporters, and close down the business.

19. Ms. Whiteman is in the best position to clarify the extent and character of her activities, and contradict the inference that she followed her superior's instructions to try and persuade individual employees to sign a statement repudiating the union. Ms. Whiteman was present in the room throughout the hearing. She did not give evidence.

20. In his cross-examination of Mrs. Mutton counsel for the respondent sought to introduce certain evidence of other complaints of illegal conduct which had been made and later settled or withdrawn. The applicant objected to the introduction of this evidence. Evidently Mrs. Mutton had terminated her employment (citing *inter alia* the treatment to which she had been subjected); a section 79 complaint had been filed on her behalf, the respondent had agreed to re-employ her and she has, to date, chosen not to return. Certain other complaints were made and later withdrawn. Marvin Davis also has terminated his employment. This evidence could reflect on the witness' credibility, or support an inference that the Board's remedial machinery was adequately protecting employees so that they would not reasonably be concerned about their job security. (See *Radio Shack*, [1978] OLRB Rep. Mar. at paragraph 27.) On the other hand, it might equally support an inference that the respondent had created an atmosphere in which the two known union supporters were reluctant to remain. In the circumstances the Board admitted the evidence, reserving as to its weight. We did not entertain evidence concerning the actual settlement discussions, and the respondent did not seek to lead such evidence.

21. Having outlined the facts applicable to the applicant's request that it be certified pursuant to section 7a, we now turn to section 7a itself, and the related sections of the Act which the applicant argues have been contravened. These are as follows:

"7a. Where an employer or an employers' organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

56. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

58. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

(c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other

means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

61. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act."

22. Section 7a is an extraordinary remedy which has been in the Act in its present form since 1975. The origin and purpose of section 7a has been elaborated in *Ex-Cell-O Wildex Canada*, [1977] OLRB Rep. June 370 – a case which is similar in some respects to the present one:

"14. Certification without a vote under section 7a was designed as both a deterrent to illegal employer interference in union organizational campaigns, and as a device to provide a meaningful and effective remedy in those cases where the employer's interference operated to destroy the free selection process guaranteed by section 3 of the Act. Prior to the 1975 amendments to the Act, a union seeking to have section 7(4), the predecessor to section 7a, invoked was required to have filed membership evidence on behalf of at least fifty per cent of the employees in the bargaining unit. In recognition of the fact that employer interference often occurs early in an applicant's organizing campaign, and before a majority has been obtained, the fifty per cent membership requirement was removed by the 1975 amendments.

16. As the Board pointed out in *Winson Construction Limited*, [1976] OLRB Rep. Nov. 714, the effect of applying section 7a is to take an application out of the normal certification process. Ordinarily, a union, in order to obtain automatic or outright certification under The Labour Relations Act, must exhibit unqualified support from at least fifty-five per cent of the employees in the appropriate bargaining unit. The fifty-five per cent requirement reflects the belief that there must be some margin for error; and that, therefore, something more than a simple majority is necessary to ensure that the bargaining agent has a true mandate. Where, as here, an applicant union does not obtain the membership percentage required to qualify for outright certification, but enjoys the support of at least forty-five per cent of the bargaining unit employees, the Board will normally order a representation vote. In order to be certified after a vote, an applicant must obtain at least fifty per cent of the votes cast.

17. Section 7a allows the Board to certify a trade union as bargaining agent without the membership percentage usually required for outright certification. It is not surprising, then, that the Legislature has placed a number of legal restrictions on its use. As the wording of the section makes clear, it is not enough that the employer has engaged in conduct prohibited by The Labour

Relations Act. This conduct must have resulted in a situation where the true wishes of the employees are not likely to be ascertained from the results of a representation vote. As well, the trade union must, in the opinion of the Board, have membership support adequate for the purposes of collective bargaining in the union found appropriate by the Board.

18. The logic of these requirements is clear enough. The premise of the Act's certification procedures is that collective bargaining is to be afforded only when it is the choice of the majority. Accordingly, the grant of automatic certification to a trade union, in the absence of documented evidence of majority support, should only be permitted where the true wishes of the employees are not likely to be ascertained through the normal procedures and where the union has sufficient support among the employees in the unit to bargain collectively with the employer.

19. The Board has indicated, quite clearly, that certification without a vote under section 7a is not an automatic response to every unfair labour practice which occurs in the pre-certification period, and that an applicant must establish substantial employer interference in the certification process to secure a determination that "the true wishes of the employees are not likely to be ascertained." (See, for example, *Robin Hood Multifoods Limited*, [1976] OLRB Rep. May 250.) In this regard, a distinction has been drawn between the criteria used to determine whether a statement of desire (or petition) in opposition to an application for certification reflects the true wishes of the employees who signed it and the criteria used to determine whether the true wishes of the employees are not likely to be ascertained from the results of a representation vote, which is conducted under the supervision of the Board, and by secret ballot. As the Board stated in *Smith Beverages Limited*, [1975] OLRB Rep. Dec. 956, if an employee logically suspects that his employer will become aware of his signing or his refusal to sign a petition, this can effectively thwart his free expression as represented by his signature. For this reason, very little in the way of employer interference, in the surrounding circumstances, need be shown for the Board to conclude that a petition does not represent a true change of mind by the employees who signed it such that it should cause the Board to exercise its discretion to order a vote. The situation is quite different on representation vote, however, where the employees can usually rest assured that their choice will not be revealed to their employer; and therefore, the Board requires evidence of intimidation or coercion such that the secrecy of the ballot cannot be relied upon to ensure a free expression of employee views."

23. An applicant seeking certification pursuant to section 7a must do more than show one or more contraventions of the Act. It must be shown that the contravention is of such a nature, or so pervasive in effect, that the true wishes of the employees cannot now be ascertained. An isolated illegal act may not unduly impede the ability of employees to express their wishes in a Board supervised representation vote – particularly where the bargaining unit is large so that employees can be assured that their anonymity will be preserved and the employer will not, as a practical matter, be able to penalize the union supporters. In *Winson Construction Ltd.*, [1976] OLRB Rep. (Nov.) 714, the Board offered this example of the kind

of intimidatory, or coercive, activity which would, by its very nature, be likely to obscure the true wishes of employees:

“No general rules can be set down as to what circumstances might justify a conclusion that employee desires are not likely to be ascertained in a representation vote. Rather, each case must be decided on its own particular facts. In some instances the actions of an employer may be such that a determination that a vote would not be reflective of employee desires may be very easily arrived at. For example, a warning to employees that the certification of a trade union would result in lay-offs and shorter working hours would, lacking any other considerations, tend to have such an intimidating effect that employees might reasonably be expected to refrain from voting for the union no matter what their true feelings about being represented by it ... In such a situation to vote in favour of being represented by the trade union might well appear to employees to be tantamount to voting themselves either out of a job or, at best, a drop in pay.”

24. In assessing an employer's conduct the Board must bear in mind that, while employer and employee are equals before the law, they are not usually equals in the market place. The employer will typically have a considerable degree of influence over his employees' economic destiny, especially if the number of employees is relatively small. He must for this reason be circumspect in his dealings with employees, and refrain from making statements which could reasonably be construed as a threat to their job security. As the Board observed in *Bell & Howell Ltd.*, [1968] OLRB Rep. (Oct.) 695 at p. 706:

“An employer may express his views and give facts in appropriate manner and circumstances on the issues involved in representation proceedings in so far as these directly affect him and has the right to make appropriate reply to propaganda directed against him in relation thereto. However, he should bear in mind in so doing the force and weight which such expressions of views may have upon the minds of his employees and which derive from the nature and extent of his authority as employer over his employees with respect to their wages, working conditions and continuity of employment. He should take care that such expressions of views do not constitute and may not be reasonably construed by his employees to be an attempt by means of intimidation, threats, or other means of coercion to interfere with their freedom to join a trade union of their choice or to otherwise select a bargaining agent of their own choice.”

25. There can be no doubt that in the present case there has been a contravention of The Labour Relations Act; indeed, counsel did not contend that there had not been. We are satisfied that there has been a serious and substantial interference with the right of the applicant to organize, and the right of employees to select or reject a bargaining agent free from improper employer pressure. The pattern of threats, interrogation and direct approaches to employees in an effort to persuade them to repudiate their union membership constitute a breach of sections 56, 58(c) and 61 of the Act, all of which prohibit the intentional use of intimidation or coercion in order to compel an employee to refrain from becoming or cease to be a union member. Moreover, we are also satisfied that the illegal interference engaged in by the respondent is inherently likely to influence an employee's ability

to vote in accordance with his own free wishes. The employer's actions have caused employees to believe that by supporting, or continuing to support, the union they could be placing their jobs in jeopardy. Employer antipathy to a trade union is neither unusual nor, in itself, illegal; but the present case goes well beyond simple opposition to the union and includes threats directed at union supporters and a threat to close the business rather than deal with a union. The employees have been warned that a vote for the trade union may well be a vote for unemployment. In the circumstances, we are satisfied that the true wishes of the employees are not now likely to be ascertained.

26. The final condition which must exist before the Board may certify a trade union under section 7a is that the union have membership support adequate for collective bargaining. In the present case the applicant has submitted documentary evidence of support among almost half of the employees in the bargaining unit found by the Board to be appropriate for collective bargaining. There is some suggestion that certain employees may have had a "change of heart" but there is no direct evidence of this; and even if there were, it would have to be assessed against a background of intimidatory employer conduct designed to evoke precisely this response. In the result, therefore, and having regard to all of the evidence before us, we are satisfied that the trade union has membership support adequate for collective bargaining.

27. In reaching our conclusion – that the applicant has fulfilled all of the requirements for a certificate pursuant to section 7a, we are not blind to the realities of the situation, nor are we sanguine about the prospects of the parties establishing an easy and amicable collective bargaining relationship. A section 7a certificate is a particularly inauspicious beginning for a bargaining relationship, and the statutory duty to bargain in good faith is no substitute for the actual recognition that both employers and employees have legitimate interests which can be accommodated in the collective bargaining process. Nevertheless, these considerations are equally applicable to many new bargaining relationships, and are no reason to refuse to issue a certificate where, as here, the conditions precedent have been satisfied.

28. A certificate will issue to the applicant.

0028-79-U Ontario Nurses' Association, (Complainant), v. Scarborough Centenary Hospital Association, (Respondent).

Changes in Working Conditions – Whether changing hours of work violation of statutory freeze.

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members R. Redford and W. F. Rutherford.

APPEARANCES: *Gordon Sato and Sharron Scott for the complainant; M. Levis and M. Hallam for the respondent.*

DECISION OF THE BOARD; June 22, 1979

1. The name "Scarborough Centenary Hospital" appearing in the style of cause of this complaint as the name of the respondent is amended to read: "Scarborough Centenary Hospital Association."

2. This is a complaint filed under section 79 of The Labour Relations Act alleging a violation of section 10 of The Hospital Labour Disputes Arbitration Act. The complainant alleges that the respondent altered the hours of work of 465 nurses during the section 10 freeze period without its consent thereby violating section 10 of the Act.

3. Section 10 of the Act provides:

"Notwithstanding subsection 1 of section 70 of *The Labour Relations Act*, where notice has been given under section 13 or 45 of that Act by or to a trade union that is the bargaining agent for a bargaining unit of hospital employees to which this Act applies to or by the employer of such employees and no collective agreement is in operation, no such employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees, and no such trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees, until the right of the trade union to represent the employees has been terminated."

4. The facts in this matter are not in dispute and may be summarized as follows. The union served the respondent with notice to bargain for a renewal agreement on September 27, 1978. The parties have not as yet entered into a new agreement. On March 14, 1979 the respondent notified its nurses that effective from the day shift of April 29, 1979 the hours of duty for nurses working 7 ¾ hour tours were to be changed. The posted memorandum reads as follows:

"SCARBOROUGH CENTENARY HOSPITAL

MEMORANDUM

TO: All Nursing Units DATE: March 14, 1979

FROM: Nursing Administration RE: Change in Hours of Work
Effective from the day shift of April 29, 1979, the hours of duty for nursing staff will change to:

7¾ hr	Nights	— 2400 hrs to 0815 hrs
tours	Days	— 0800 hrs to 1615 hrs
	Evenings	— 1600 hrs to 0015 hrs
8 hr	Nights	— 2400 hrs to 0830 hrs
tours	Days	— 0800 hrs to 1630 hrs
	Evenings	— 1600 hrs to 0300 hrs

The staff scheduled to work nights on April 28th will start at 2330 hrs April 28th and work until 0815 (or 0830 hrs) April 29th. The day shift on April 29th will report for work at 0800 hrs. (Because of the time changes at 0200 hrs to daylight saving, no overtime will be involved).

The staff scheduled to work nights on April 28th will start at 2330 hrs April 28th and work until 0815 (or 0830 hrs) April 29th. The day shift on April 29th will report for work at 0800 hrs. (Because of the time changes at 0200 hrs to daylight saving, no overtime will be involved).

This change will mean that the night shift will be the *first* shift of the day. Therefore, if you are scheduled for nights on Monday, you report for duty at 2400-hours on Sunday night.

On statutory holidays, the premium will now be paid to the staff who start work at 2400-hours of the holiday date.

Please note the week-end for the night shift will now be Saturday and Sunday (instead of Friday and Saturday)."

The bargaining agent did not give its consent to the changes detailed in the March 14th memorandum which took effect on April 29th. The hours of work had remained unchanged from 1968. During the previous round of negotiations the employer sought the agreement of the union to institute the changes to the hours of work which it unilaterally instituted on April 29th. In support of its demand the hospital made the following submission to the Arbitration Board which determined the terms of the parties last collective agreement:

"SCHEDULING – Change in Commencement Hours

For the purposes of administering tours and paying holiday pay and identifying 'weekends', the Hospital has recently used the tour starting times of 0730, 1530 and 2300. It is now apparent to the Hospital that tour starting times of 0800, 1600 and 2400 would be administratively more convenient. Therefore, the Hospital requests the following decision:

References to the commencement of daily tours or references to other times relating to the commencement of tours shall be amended throughout the collective agreement to indicate that the Hospital has changed the tour commencement times to 0800, 1600 and 2400 respectively.

In order to make this alteration, one night of 'lagtime' will be required. It is requested that the necessary lag-time be paid only at straight time hours.

Mr. Levis' letter to Mary Hodder dated June 1, 1978 and which follows herein, sets out the basis of the Hospital's proposal. No written response to the letter was received."

The arbitrator did not make the change to the scheduling provisions as sought by the Hospital but reinstituted the status quo instead.

5. There is no dispute that the change in the starting and quitting times implemented by the hospital on April 29th took place during the section 10 freeze period. The issue before the Board is whether or not the change constituted a violation of section 10 in the

circumstances of this case. The union argues that the hospital has unilaterally altered a long standing condition of employment which is not specifically dealt with in the collective agreement other than by implication in article 16(8) of the collective agreement which provides that a weekend is defined as 23:30 hours Friday to 23:30 hours Sunday and that having regard to the purpose of Section 10 the hospital's initiative must be found to be in violation of the section. The hospital, on the other hand argues that it had the right under article 30(c) of the collective agreement to make the change and in that Section 10 preserved its right in this regard the exercise of this right could not be in violation of the section.

6. The relevant sections of the collective agreement are:

“ARTICLE 3 – RESERVATION AND CONTINUATION OF MANAGEMENT FUNCTIONS

3.01 The Association recognizes that the management of the Hospital and the direction of working forces are fixed exclusively in the Hospital and shall remain solely with the Hospital except as specifically limited by the provisions of this Agreement, and without restricting the generality of the foregoing the Association acknowledges that it is the exclusive function of the Hospital to:

- (c) determine in the interest of efficient operation and highest standard of service, job rating or classification, the hours of work, work assignments, methods of doing the work and the working establishment of the service;

ARTICLE 16 – HOURS OF WORK AND WORKING CONDITIONS

16.01 The following provisions designating regular hours on a daily tour and regular daily tours over the Hospital's nursing schedule shall not be construed to be a guarantee of the hours of work to be done on each tour or during each tour schedule

- (a) The normal daily tour shall be seven and three-quarter hours exclusive of an unpaid meal period and subject to continuation of current practices for rest periods.
- (b) Schedules will provide ten (10) tours of duty in a two week period for full-time nurses working seven and three quarter hour tours.

16.03. Authorized work performed in excess of 7.75 hours in a day or 77.5 hours in a two week pay period, as above shall be paid at the rate of time and one-half the nurse's straight time hourly rate of pay for all hours worked except in the case of nurses working 11.75 hour tours who work in excess of their regular scheduled tours.

16.04 Scheduling

- 8) Should a nurse work more than three consecutive weekends, she shall

be paid time and one-half her basic rate for the fourth weekend, and every consecutive weekend until a weekend is scheduled off save and except where:

- i) such weekend has been worked by the nurse to satisfy specific days off requested by such nurse; or
- ii) such nurse has requested weekend work; or
- iii) such weekend is worked as the result of an exchange of tours with another nurse.

Regular part-time nurses not in the Relief Pool will be assigned to the units will be assigned a minimum of one weekend off in two.

Regular part-time nurses on the Relief Pool will be assigned a minimum of two weekends off in three unless the nurse requests to work more weekends, and it is mutually agreed upon.

A weekend is defined as 2330 hours Friday to 2330 hours Sunday.

If a nurse is absent on a weekend scheduled to work, she may be required to make up that weekend."

7. Section 10 of the Act freezes not only wages and any other term or condition of employment, but also rights, privileges or duties. The Board described the extent of the freeze under section 70 of The Labour Relations Act which is identical in effect to section 10 in the *Kodak Canada Ltd.* case (1977) OLRB Rep. Feb. 49 in the following terms:

"A total freeze of the collective bargaining relationship also appears to be contemplated by section 70(3), providing for arbitration differences arising during the freeze period. This provision, as interpreted by the Board in *United Gas Ltd.*, expresses a clear preference that such differences be resolved through grievance arbitration. This provision for arbitration indicates that the Legislature contemplated a continuation of the collective bargaining relationship after the contractual expiry of the collective agreement. The legislative language, therefore, does not in any way support the conclusion that only terms and conditions of employment are preserved by operation of section 70(1). Rather, the better interpretation is that all legal incidents of the collective bargaining relationship are maintained by this section until its force becomes exhausted."

The employment relationship is maintained in its entirety by section 10 so that in practical terms it falls to the Board in these matters to determine the component elements of the collective bargaining relationship as of the date the freeze took effect, the collective bargaining status-quo as it were, and to then assess the change or alteration complained of against this fixed point of departure.

8. While the collective agreement forms the cornerstone of any collective bargaining

relationship, it does not necessarily provide the Board with the required fixed point of departure in every case. As the Board commented in *A. N. Shaw Restoration Ltd.* [1978] OLRB Rep. June 479, after considering the extent of the freeze described in section 70:

“...the legislature has recognized that the full extent of the day to day relationship is not necessarily found within the four corners of the collective agreement. Many incidents of an on-going relationship are not codified and indeed, aspects of the relationship which are codified may nevertheless be carried on in a manner inconsistent with the written word. It is evident from a reading of Section 70 (1) and indeed it is consistent with its purpose, that it be construed as freezing of the total relationship and not simply the terms of the written document. The Board, therefore, in deciding if the action complained of alters the status quo must look to the total relationship including but not confined to the terms set out in the collective agreement.”

The Board decided in the *A.N. Shaw* case (*supra*) that the trade union could not enforce an express term of the collective agreement which it would have been legally estopped from enforcing at the time the freeze commenced. The Board found that the union, by its failure to require compliance, had extended a privilege which constituted a part of the collective bargaining status quo and could not be withdrawn during the section 70 freeze period. In two other cases, however, the Board found, absent the existence of an estoppel as in *re A.N. Shaw* (*supra*) that express rights contained in a collective agreement were maintained under section 70 even though they had not been exercised in respect of the employees affected for a number of years (see *re Molson's Brewery (Ontario) Limited, Toronto* case [1977] OLRB Rep. Aug. 526, *Scarborough Centenary Hospital* case [1978] OLRB Rep. Oct. 949). Reference should also be had in this regard to *Kodak Canada Limited* (*supra*). While it is clear that an express right contained in a collective agreement forms a part of the collective bargaining status quo, absent conduct by the party seeking to rely upon the right which would have estopped it from doing so at the commencement of the freeze period, the Board found in *Wellesley Hospital* [1976] OLRB Rep. July 364, that a company could not rely on its “residual authority” to alter a long-standing privilege enjoyed by members of the bargaining unit.

9. In the instant case the Board has before it a collective agreement which does not stipulate the starting and stopping times of work and more importantly for our purposes, expressly provides the hospital with the “exclusive function” to determine the hours of work. There is no evidence before the Board to support the conclusion that the hospital would have been estopped from exercising its express right to determine hours of work at the commencement of the freeze period. The hospital's attempt to negotiate the desired change in the hours of work during the last round of negotiations does not alter the result. The demand was made in context of “administering tours and paying holiday pay and identifying weekends” and does not in any way undermine its express right to determine hours of work as contained in the present collective agreement. It was open to the union in the last round of bargaining to negotiate specific starting and quitting times in the collective agreement if it wished to remove from the hospital the exclusive right to make these determinations. Having failed to do so it is the view of the Board, having read the express provisions of the agreement, that the reasonable expectation of the parties at the time the freeze commenced was that the hospital had the right to alter the starting and stopping times of work so long as it did not violate the provisions of article 16 dealing with hours of work and scheduling. It is

this aspect of the collective bargaining relationship which is preserved and accordingly, the Board hereby finds that the Hospital did not violate the freeze period when it altered the starting and quitting times of work on April 27, 1979.

10. Having made this finding the Board is compelled to reiterate that the hospital's express right to alter the starting and quitting times of work does not allow it to violate any of the provisions of article 16. The provisions of article 16 are as much preserved by the section 10 freeze as is the employer's right to institute new hours of work. In this regard the Board makes specific reference to the definition of "weekend" in article 16.04(8). The period 2330 hours Friday to 2330 hours Sunday remains as the "weekend" for purposes of administering article 16.04. The hospital is prohibited by section 10 from unilaterally altering any of the express provisions of article 16 and in so far as it is utilizing a weekend period other than that stipulated in article 16.04(8) for purposes of administering article 16 it is in violation of section 10 of the Act.

0234-70-U United Brotherhood of Carpenters and Joiners of America, Local 3054, (Complainant), v. **Selinger Wood Ltd.**, Peter Selinger, and Walter Milley, (Respondents).

Charges – Change in Working Conditions – Collective Agreement – Section 79 – Notice to bargain untimely under collective agreement – timely notice under Act – whether agreement renewing automatically – Union alleging total refusal of employer to comply with agreement – whether Board deferring to Arbitration.

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members M. J. Fenwick and E. C. Went.

APPEARANCES: *Julius Melnitzer and Adam Salvona for the complainant; R. A. Werry and Robert Selinger for the respondent.*

DECISION OF KEVIN M. BURKETT, VICE-CHAIRMAN AND BOARD MEMBER E. C. WENT;

1. This is a complaint filed under section 79 of the Act in which the complainant alleges that the respondent employer has violated section 14, 35, 46, 56 and 70(1) of the Act.
2. The respondent company became bound to the terms of a collective agreement between the complainant union and Goderich Manufacturing Co. Limited by virtue of the provisions of section 55 of the Act and a declaration by the Board thereunder. The disposition of the alleged violations of section 14 and 70 requires a determination by the Board as to the expiry date of that agreement.
3. Article 19.01 of the collective agreement provides:

"This agreement shall become effective as of the 1st day of July, 1977,

and shall remain in full force and effect until the 12th day of December, 1978, and shall be automatically renewed for a further period of one year unless notice in writing is given by either party of its desire to change, modify or terminate this agreement within the period of ninety (90) days prior to the 30th day of June 1978.”

The union served notice of its desire to change or modify the agreement on September 14, 1978. The notice, although tendered some two months before the December 12, 1978 expiry date of the agreement, fell outside the 90 day notice period stipulated in Article 19.01. At the time of the giving of notice the company took the position that because the union had failed to give written notice in accordance with article 19.01 the agreement was “automatically renewed for a further period of one year.” At that time the union disputed the position taken by the company. In the interim the parties have reversed their positions. The company now argues that the notice given on September 14, 1978 complies with section 45(1) of the Act and therefore serves to terminate the agreement effective December 12, 1978 regardless of the position taken by it at the time. The union now argues that section 45(2) of the Act allows the parties to a collective agreement to contract out of the requirements of section 45(1) which it argues is framed in permissive rather than mandatory terms. The union now takes the position that having failed to comply with the notice period under article 19.01 the agreement “automatically renews” and continues until December 12, 1979.

4. Section 45(1) and (2) provide:

“45(1) Either party to a collective agreement may, within the period of ninety days before the agreement ceases to operate, give notice in writing to the other party of its desire to bargain with a view to the renewal, with or without modifications, of the agreement then in operation or to the making of a new agreement.

(2) A notice given by a party to a collective agreement in accordance with provisions in the agreement relating to its termination or renewal shall be deemed to comply with subsection 1.”

5. Although the union complied with the notice requirements set out in section 45(1) of the Act it failed to comply with the more restrictive notice requirements contained in article 19.01 of the collective agreement. The Board must determine if notice which fails to comply with the notice provisions contained in a collective agreement can be found to have been given pursuant to section 45(1) of the Act so as to trigger the termination of that agreement when by express terms of the agreement it is automatically renewed for a further period of one year if its notice requirements are not met. If it is found that the notice given in this case served to trigger the termination of the agreement effective December 12, 1978 then the parties are covered by the section 70 freeze provision and are required to bargain in accord with the duty set out in section 14 of the Act. If, on the other hand, it is found that the notice given in this case did not trigger the termination of the agreement effective December 12, 1978 then the agreement will have been automatically renewed for a further one year period and the complaint, in so far as it relates to section 14 and section 70, must fail.

6. In *Hield Brothers Limited*, 57 CLLC ¶18,072, the first in a series of Board cases dealing with essentially the same issue as that before the Board in this case, the Board held

that because the collective agreement "continued in effect" failing compliance with its notice requirements, it never "ceased to operate" within the meaning of section 45 and accordingly, notice could not be given pursuant to section 45. In the circumstances, section 45 was held to be inapplicable. In reaching its conclusion the Board contrasted the agreement before it with those that provide for "automatic renewal" in the event of a failure to comply with the notice provisions therein. The Board commented that the term "renew" suggested not a continuance of the existing agreement but a regeneration of the old agreement immediately following its termination and ruled that if the word "renew" was used rather than "continue in operation" Section 45 would apply.

7. The distinction drawn by the Board in the *Hield* case (supra), that is, as between a collective agreement which continues in existence until terminated by the act of one of the parties and a collective agreement which ceases to operate and is then revived unless notice is given, has been consistently applied by the Board in a series of subsequent cases, albeit with some reservation in the most recent cases. In this regard see *Nortex Products*, [1978] OLRB Rep. Nov. 1036, *London Generator Service*, [1978] OLRB Rep. Oct. 932 and *Palmerston Town Manor Home for the Aged* case, Board File 1657-78-M, May 14, 1979.

8. Having regard to the language of the agreement before us and the relevant Board jurisprudence, it must be our conclusion as well that the union's notice of September 14, 1978 complied with the requirements of Section 45(1) of the Act. Notice was given by the union on September 14, 1978 of its desire to bargain with a view to the renewal of an agreement which "ceased to operate" on December 12, 1978. The failure of the union to meet the notice requirements contained in the collective agreement does not alter our conclusion. Although notice given pursuant to the terms of a collective agreement is deemed under section 45(2) of the Act to comply with the requirements of section 45(1), it is not required under section 45(1) that notice be given in accord with the term of the collective agreement in order to constitute proper notice under the Act. In a situation where the notice requirement in the collective agreement is more restrictive than that contained in the Act and the notice given satisfies the requirements of the Act but not the agreement, the provisions of the Act, as drafted, take precedence. Reference is made to *Utah Company of the Americas v. I.U.O.E. et al*, (1960) 21 D.L.R. (2d) 166, a Saskatchewan Court of Appeal case in which the Court upheld the Saskatchewan Labour Relations Board which held, on language similar to the Ontario statute, that notice given in accordance with the statute was timely notwithstanding that it did not comply with the terms of the collective agreement.

9. In the result we hereby find that notice under section 45(1) of the Act was given by the union on September 14, 1978 and that accordingly, the collective agreement ceased to operate from December 12, 1978. The section 70 freeze commenced from that time and the parties were bound by the duty to bargain in good faith set out in section 14 of the Act in their negotiations for a renewal agreement.

10. The second issue before the Board concerns the nature of the complaints themselves. The respondent, relying on the fact that grievances have been filed under the collective agreement in respect of allegations (a) to (e), takes the position that the matters complained of constitute alleged violations of the collective agreement which should be dealt with at arbitration and not before the Board. The respondent referred the Board to its long-standing policy of deferral to arbitration where the matter complained of constitutes both a violation of the Act and a breach of the collective agreement and where both the alleged un-

fair labour practice and the breach of the agreement can be dealt with at arbitration. The union takes the position that its allegations, if proven, go beyond a number of individual breaches of the collective agreement but constitute a refusal by the employer to recognize it. The union argues that an arbitrator would not be empowered to make such a finding under section 56 of the Act and in the circumstances the matter should be heard by the Board. There is a qualitative difference between an alleged violation of a collective agreement which is otherwise being honoured by the employer and an alleged violation or violations which, if proven, would constitute a de facto refusal to recognize the trade union. In the former situation the Board's policy of deferral, as described in *Imperial Tobacco* [1974] OLRB Rep. July 418, makes good sense and would apply. In the latter case, however, the allegations go to the heart of the collective bargaining structure as established under the Act and as such should be heard by the Board as the agency with sole jurisdiction to administer the Act. Having regard to the nature of the grievances, which brings the complaint within the ambit of Section 56 of the Act, and to the fact that the alleged violations of the agreement occurred during the Section 70 freeze period so as to constitute alleged violations of Section 70 of the Act as well, the Board asserts its jurisdiction to hear these matters and directs the Registrar to set a hearing date.

DECISION OF BOARD MEMBER M. J. FENWICK:

Mr. Fenwick's decision will be given at a later date.

0758-76-U Phyllis Barr, (Complainant), v. **Somerville Industries Limited**, (Respondent), v. **International Chemical Workers Union**, (Intervener).

Arbitration – Practice and Procedure – Section 79 – Complaint originally deferred to arbitration – no arbitration hearing on merits – Complainant returning to Board after losing at arbitration and in Court – Board proceeding with original complaint.

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members H. J. F. Ade and D. B. Archer.

APPEARANCES: *S. T. Goudge, D. Ublansky, Ann Weir and Phyllis Barr for the complainant; W. J. McNaughton and K. Walker for the respondent; no one appeared for the intervener.*

DECISION OF THE BOARD; June 11, 1979

1. This is a complaint filed on July 19, 1976 under section 79 of the Act. At the initial hearing the respondent argued that because the grievances had been filed under the collective agreement in respect of the same fact situation giving rise to the section 79 complaint and because the agreement contained a no discrimination for trade union activity clause, the Board should follow its usual practice and defer to arbitration. It was brought to the Board's attention at that time that the employer had raised a preliminary objection to the arbitrability of the grievance on the merits. In a decision dated September 13, 1976 the Board, after citing the rationale in support of its deferral policy, deferred to the arbitration

process but remain seized of the matter in the event that the arbitration did not deal with the allegation before the Board.

2. The matter was processed to arbitration on March 11, 1977 under an agreement between the parties that the sole issue to be determined by the arbitrator was whether or not the grievor was a seniority employee. The agreement of the parties in this regard is set down in para. 1 of the arbitration decision as follows:

“At the hearing into the matter it was agreed by the parties that a determination of the issue as to the status of the grievor would resolve the issue as to the merits of the discharge. Thus the Company agreed that, if the Board were to conclude that the grievor was a seniority employee at the time of her discharge, the facts do not provide the Company with just cause for discharge and the grievor would be taken back. Similarly, the union agreed that, should the Board conclude that the grievor was a probationary employee, that would end the matter. The parties further agreed that, in the event that the Board were to conclude that the grievor was a seniority employee, it remain seized of jurisdiction in respect of any outstanding issues concerning consequential relief.”

The union maintains, and the company does not dispute, that it never agreed to withdraw the proceedings before the Board. The union maintains, and we are satisfied, that the agreement referred to at para 1 of the arbitration award, as reproduced above, was made in respect of the arbitration proceedings only. It goes without saying, however, that if the union's position had been upheld at arbitration, there would have been no need for the union to return to the Board.

3. The arbitration award was handed down on May 16, 1977. The arbitrator found that the grievor was a probationary employee and dismissed the grievance. The union took no action on the matter until December 12, 1977 (seven months after release of the award) when it served notice of its intention to seek judicial review of the arbitration decision. The union's statement and record were filed and the judicial review application perfected on August 8, 1978; some 8 months after serving notice of its intention. The judicial review was heard on February 7 and 8, 1979 and a majority decision of the Divisional Court dismissing the application was released on March 14, 1979. Notice of motion for leave to appeal to the Court of Appeal was filed by the union on April 2, 1979 and on April 17, 1979 the union filed notice of motion to extend time for application for leave to appeal to the Court of Appeal. The same day, April 17, 1979, the union requested the Board to continue the Section 79 complaint which had been adjourned on September 13, 1976.

4. The respondent argues that the agreement of the parties in respect of the issue to be addressed at arbitration made it clear to all from as early as May 16, 1977 that the merits of the complaint before the Board would not be addressed at arbitration. It is the position of the respondent that if the union intended to return to the Board it should have done so at that time and not two years later. The respondent cites its inability to properly investigate the allegations against it at this time, the difficulty of witnesses recalling events of 3 years ago, the investment it has made in a replacement employee and the on-going liability to which it would be subject should the matter be heard now in support of its position that the undue delay caused by the union has prejudiced its position and should cause the Board to

terminate the Section 79 proceedings. The respondent argued that the prejudice is especially acute in a case such as this where the legal burden rests with the respondent under section 79(4a) of the Act. The respondent relied on re *CCH Canadian Limited* case [1977] OLRB Rep. June 351 and a number of arbitration awards in support of its contention that where undue delay results in prejudice to the other side so as a fair hearing cannot be conducted the matter should not be heard.

5. The complainant explained through her counsel that she always intended to return to the Board if satisfied that a correct finding of probationary status had been made at arbitration. The complainant was of the view, however, that an incorrect finding of probationary status had been made and that consequently, she chose to seek judicial review, as she was entitled to do, which she hoped would result in a favourable disposition of the matter. The complainant argues that in any event it does not lie in the mouth of the company to claim prejudice at this time having taken the position before the Board in August, 1976 that the matter should not be heard at that time but deferred to arbitration. The complainant argues that the decision of the Board dated September 13, 1976 makes it clear to the company that there existed a possibility of the matter returning to the Board and that the company should have governed itself accordingly. The complainant maintains that the company itself could have brought the matter forward to the Board from May, 1977. The complainant further maintains that the Board cannot abandon its role as policemen of the Act in the circumstances of this case and refuse to hear a complaint under the Act which was initially filed in a timely fashion.

6. It is important at the outset to clearly identify the issue which now faces the Board. The Board is being asked to terminate proceedings which were filed in a timely manner in the first instance but were returned to the Board, following its deferral to arbitration, after what is alleged to be an inordinate and prejudicial delay. A separate issue, and one which must be addressed by the Board if it decides to proceed in this matter, is the quantum of compensation should the Board find in favour of the complainant. While the complainant's failure to return to the Board at an earlier date might cause the Board to reduce the amount of compensation owed to her should a finding in her favour be made, that issue is not before the Board at this time. The issue before the Board at this time is whether or not the proceedings should be terminated because of prejudice suffered by the respondent resulting from the complainant's failure to return to the Board at an earlier date.

7. This case is clearly distinguishable from those relied upon by the respondent in support of its position that these proceedings be terminated. In this case the matter was promptly filed in the first instance and the union was prepared to proceed in August of 1976. It was the respondent who, at that time, asked the Board to defer to arbitration. The Board, having considered the representations of the parties in this regard, agreed with the respondent and deferred to arbitration. The Board, however, recognized that the matter might not be disposed of on its merits at arbitration and remained seized. While in hindsight the Board might have placed a time limitation upon its retention of jurisdiction following knowledge by the parties that the arbitration procedure (and any subsequent judicial review arising therefrom) would not deal with the merits, it did not do so. It is against this backdrop that the respondent's request that the matter be terminated must be considered.

8. The complaint was filed promptly in the first instance and would have been dealt with on August 25, 1976 had the Board not accepted the representations of the respondent

and deferred to arbitration. The Board must assume, therefore, that as of August 25, 1976 the respondent had fully investigated the matter and was ready to proceed. The Board's decision of September 13, 1976 put the respondent on notice that the matter might return to the Board at some future date. In these circumstances the Board cannot accept that the respondent has been prejudiced to the extent that it could not now receive a fair hearing.

9. In the absence of any time limitation upon the Board's retention of jurisdiction, in the face of the complainant's pursuit of the matter through the Courts and in the face of the Board's finding that, in the circumstances of this case, the respondent has not been prejudiced by delay to the extent that a fair hearing is impossible, it is the decision of the Board to proceed with this matter. It is, however, the decision of the Board that the complainant should proceed first in the circumstances so as the respondent knows precisely the case it must meet. The quantum of compensation, should the Board find in favour of the complainant, is tied to both the legitimacy of the complainant's delay in returning to the Board and her attempt to mitigate. The parties will be given full opportunity to lead evidence and make representations in this regard at the appropriate time.

10. This matter is hereby referred to the Registrar who is directed to put the matter on for hearing.

0222-79-R Hotel & Restaurant Employees Union, Local 756, (Applicant), v. Terminal Hotel, (Respondent), v. Group of Employees, (Objectors).

Certification – Petition – Reasonable apprehension identity of employees opposing union becoming known to management – voluntariness of petition suspect.

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members M. J. Fenwick and W. Gibson.

APPEARANCES: *A. J. Sandy Potter and Charles Ireton for the applicant; Jack Cormier and John Spears for the respondent; W. A. Hay and Ben Dorion for the objectors.*

DECISION OF KEVIN M. BURKETT, VICE-CHAIRMAN AND BOARD MEMBER M. J. FENWICK: June 4, 1979

1. The name "The Terminal Hotel (Running Pump Lounge)" appearing in the style of cause of this application as the name of the respondent is amended to read: "Terminal Hotel".
2. This is an application for certification.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.
4. Having regard to the agreement of the parties, the Board further finds that all

bartenders, waiters, cashiers, busboys, and doormen employed by the respondent at its licensed premises at 180 King Street East, Hamilton, Ontario, save and except managers and those above the rank of manager, constitute a unit of employees of the respondent appropriate for collective bargaining.

5. Mr. G. M. Martin works as a relief manager. The parties are in dispute as to whether or not he worked as a relief manager on the date of the application and if so, whether or not his duties and responsibilities would be considered by the Board to be managerial functions within the meaning of Section 1(3)(b) of the Act. Accordingly, the Board hereby appoints Ms. B. McLean, Examiner, to meet with the parties and review the respondent's records with a view to ascertaining whether or not Mr. Martin worked as a relief manager on the day of the application and if so, to inquire into his duties and responsibilities as a relief manager and report to the Board.

6. The Board had filed with it in this matter a timely statement of desire in opposition to the application. The preamble to the statement in opposition reads:

"We, the undersigned, having carefully considered our position, hereby voluntarily withdraw our support from the proposed union in the Terminal Hotel, 180 King Street East, Hamilton.

We further advise that we want no further participation in any union activities nor to join any union.

We also advise that there has been no pressure or duress on us to make this decision."

Mr. W. A. Hay, a bargaining unit employee, appeared to give first hand evidence as to the circumstances surrounding the origination, preparation and circulation of the statement. Mr. Hay spoke with Mr. H. Korzak, a manager of the company, on Wednesday May 2nd prior to circulating the statement and indicated to him his change of heart with respect to the union. The manager advised him to speak with the other employees and see if they felt the same. Mr. Hay had discussions with some of the other employees and proceeded to draft a statement in opposition to the union which he commenced to circulate on May 5th. With the exception of one signature, the statement was circulated on company premises, albeit immediately before and after work and during break periods. Mr. Korzak, the manager, approached Mr. Hay on May 5th and asked him if he had spoken to the other employees as yet. Mr. Hay testified that he told Mr. Korzak he had spoken with others but didn't mention any names. Mr. Hay acknowledged that he informed the other employees of his discussion with Mr. Korzak prior to circulating the statement. He explained that he did so because the union organizer had told the employees not to speak with management and he wanted to "break the apprehension."

7. While the Board is satisfied that Mr. Hay himself drafted the preamble to the document and circulated it without direct assistance from the management of the company, the Board must nevertheless conclude on the evidence that management was aware of the circulation of the statement and lent its tacit support. Having regard to the sudden change of heart of those who signed the statement, the discussions between Mr. Hay and Mr. Korzak, which were known to the employees, and to the circulation of the statement on com-

pany premises, the Board is of the view that the statement was circulated in circumstances which would have caused a reasonable employee to conclude that management was aware of its circulation and might become aware of who signed and who did not. Indeed, Mr. Hay supplied both the company and the union with copies of the signed statement.

8. The Board has long recognized the inherently responsive nature of the employer-employee relationship and has found in a number of cases that the circulation of a statement in opposition to certification in circumstances which would cause a reasonable employee to believe that his choice, either for or against the union, will become known to management is sufficient to destroy the voluntariness of the statement. (See re *Morgan Adhesives of Canada Ltd.* [1975] OLRB Rep. Nov. 813 and the cases cited therein.) The Board is satisfied that such circumstances existed in this case and hereby finds on the evidence before it that the statement does not represent a voluntary expression of those who signed it. Accordingly, the Board is not prepared to give weight to the statement in opposition to this application in exercising its discretion under section 7(2) of the Act.

9. The ultimate determination of the Board with respect to the employee status of Mr. Martin may affect the union's entitlement to outright certification if Mr. Richard T. Schmith, a former employee of the respondent who has filed a Section 79 complaint in respect of his termination, is reinstated by the Board. Accordingly, the Board can proceed no further at this time.

10. This matter is referred to the Registrar.

DECISION OF BOARD MEMBER W. GIBSON:

1. I dissent.

2. I found Mr. W. A. Hay, who organized the petition, to be a very believable witness. As he was not experienced in Labour Law, we had evidence that he discussed the matter with his father (who had previous experience before the Board) and with Mr. Korzak, his Manager, asking for advice on how to proceed. Mr. Korzak's reply was that he should discuss it with the other employees. I think most managers would have replied along similar lines *unless* they were aware that a petition was going in and had been counselled by their lawyers that they must not enter into any discussion whatsoever concerning a petition. We also had Mr. Hay's evidence that he had no discussions whatsoever with any member of the firm of lawyers representing the Terminal Hotel.

3. Further, and I think this was crucial evidence, there was uncontradicted evidence before the Board that when Mr. Hay filed a copy of the petition with the Board that he sent copies to both union and management showing the names of the petitioners.

4. If management's hand was involved in the preparation and circulation of this petition, surely they would have made sure that Mr. Hay did not send to the union a listing of the petitioners. Also, I do not believe the two conversations with Mr. Korzak, even though their import was passed on to the employees, were of sufficient significance to introduce that amount of apprehension into the minds of the employees that would destroy the voluntariness of the petition.

5. For all the above reasons, I would have ordered a representation vote.

2007-78-R United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 819, (Applicant), v. **The Tower Company (1961) Ltd.** and Burjan Construction Company Ltd. Joint Venture, (Respondent).

Certification – Constitutional Law – Employee – Employer providing maintenance services to Federal Government air traffic controller training school – whether Federal Government real employer – whether employees falling within Federal jurisdiction over aeronautics.

BEFORE: Ian C. A. Springate, Vice-Chairman and Board Members H. J. F. Ade and C. A. Ballentine

APPEARANCES: *George Ryan for the applicant; P. M. Rusak and Gerald A. Pankhurst for the respondent.*

DECISION OF THE BOARD; June 6, 1979

1. The name “Eric Tower Co. (1961) Ltd. 1390 Sherbrooke St. W., Montreal, Que. and Sub. Cont., Burjan Construction Ltd., 726 Atwater Ave., Montreal Que., H46 2G9” appearing in the style of cause of this application as the name of the respondent is amended to read “The Tower Company (1961) Ltd. and Burjan Construction Company Ltd. Joint Venture.”
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.
3. This is an application for certification which was filed pursuant to the construction industry provisions of The Labour Relations Act.
4. The respondent is party to a contract with the Queen in Right of Canada represented by the Department of Transport for the supply of certain maintenance services at the Transport Canada Training Centre in Cornwall, Ontario. The training centre was described by Mr. G. Pankhurst, the respondent’s manager of special projects, as being an air traffic control training school. The respondent objects to the application on two main grounds. The first is that although the application was filed pursuant to the construction industry provisions of The Labour Relations Act, the work involved is maintenance and not construction industry work. The second ground is that the maintenance work in question is an integral part of the operation of the training centre and accordingly comes within the exclusive jurisdiction of the Federal Parliament to legislate with respect to aeronautics. If this is in fact the case, then this Board would lack jurisdiction to entertain the application, notwithstanding the fact that the regulation of labour relations generally falls within provincial jurisdiction. Related to this second ground was the respondent’s contention that the respondent does not exercise control over the employees affected by the application.
5. At the hearing the Board accepted the respondent’s submission that its operations affected by this application involve maintenance work and not work in the construction industry and that accordingly the application had been improperly filed as a construction industry application. However, at the hearing the Board also indicated that it was prepared to

treat the application as if it had been filed in accordance with the Board's procedures for non-construction industry applications.

6. We are unable to accept the respondent's contention that its operations affected by this application come within Parliament's jurisdiction over aeronautics. The scope of the federal power over aeronautics does not extend to all operations which have some aeronautical connotation, but only to those which are an integral part of, or necessarily incidental to, actual aerial transport. See the *Toronto Auto Parts (Airport) Limited* case, [1978] OLRB Rep. July 682 and the authorities referred to therein. In our view the maintenance work at the training centre performed by the employees who are affected by this application is sufficiently removed from actual aerial transport so as to be outside of the federal jurisdiction over aeronautics. Further, the fact that the employees are employed pursuant to a contract between the respondent and the Department of Transport and perform work in accordance with directives from departmental personnel does not, in our view, by itself alter the fact that the work they are performing does not fall within Federal legislative jurisdiction. Reference is again made to the *Toronto Auto Parks* case, as well as to the *Rondor Services Limited Case*, [1978] OLRB Rep. April 379.

7. The lack of control which the respondent claims to have over the employees would be relevant if one could conclude from it that the Federal Government, as opposed to the respondent, is the true employer of the employees. If the Federal Government is in fact the true employer, then we doubt that this Board would have jurisdiction to deal with labour relations matters affecting them, notwithstanding the fact that the employees would otherwise come within provincial jurisdiction over labour relations.

8. Mr. Pankhurst testified that the employees were interviewed and hired by the respondent but since the respondent has no permanent supervisor on site Department of Transport personnel both supervise the employees and also keep a record of the hours that they work. Payment to the employees is made by the respondent. Mr. Pankhurst stated that although it has not yet occurred, the Department of Transport need not ask permission of the respondent to fire anyone. The contract between the respondent and the Department of Transport, however, does not state that the Department can fire an employee. What it does provide is that the respondent at the request of a departmental official shall remove a person from the site. The contract itself clearly contemplates that the employees performing the work will be employees of the respondent.

9. The party exercising day to day control and supervision over employees is certainly a factor to be considered in determining who is their true employer. However, it is only one factor among many which must be taken into account. See *York Condominium Corporation, Number 46 and/or Medhurst Hogg and Associates Limited*, [1977] OLRB Rep. Oct. 645. In the instant case, in that the respondent hired the employees and pays them and is also recognized by the contract between the respondent and the Department as their employer, we are satisfied that the respondent and not the Federal Government is their true employer, and that accordingly the Board does have jurisdiction to entertain this application.

10. The applicant requested that the bargaining unit be described in terms of "plumbing, pipe fitting, gas fitting, welding and instrumentation" in the Board's construction area No. 31. Having regard to the fact that this is not a proper construction industry application,

however, we are of the view that the bargaining unit should be described in terms of all employees employed by the respondent in the City of Cornwall with whatever exclusions may be appropriate.

11. In that the final bargaining unit description will be considerably different from that requested by the applicant, the Board is of the view that the terminal date in this matter should be extended to June 13, 1979. The Board would also refer to subsections 1 and 2 of section 48 of the Board's Rules, which read as follows:

"48. - (1) Evidence of membership in a trade union or of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union shall not be accepted by the Board on an application for certification or for a declaration terminating bargaining rights unless the evidence is in writing, signed by the employee or each member of a group of employees, as the case may be, and,

(a) is accompanied by,

(i) the return mailing address of the person who files the evidence, objection or signification, and

(ii) the name of the employer; and

(b) is filed not later than the terminal date for the application.

(2) No oral evidence of membership in a trade union or of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union shall be accepted by the Board except to identify and substantiate the written evidence referred to in subsection 1."

12. To ensure that the employees affected by this application receive notice of the matters referred to in paragraphs 10 and 11 above, the respondent is directed to post a copy of this decision in a conspicuous place where it is most likely to come to the attention of all employees who may be affected by the application. The decision should remain posted until the close of business on June 13, 1979.

13. Mr. J. Leonard, Labour Relations Officer, is appointed to consult with the parties as to the final description of the bargaining unit. Mr. Leonard is also appointed to inquire into the list and composition of the unit.

0226-79-R Hotel, Motel and Restaurant Employees and Beverage Dispenser's Union Local 757 Thunder Bay, Ontario, of the Hotel and Restaurant Employees' and Bartenders' International Union, A.F.L. – C.I.O., (Applicant), v. **Uptown Motor Hotel (1978) Limited**, (Respondent).

Collective Agreement – Employer organization party to purported collective agreement – party allegedly bound by agreement denying existence of agreement – failure to prove status of employer's organization.

BEFORE: G. Brent, Vice-Chairman, and Board Members F. W. Murray and C. A. Ballentine.

APPEARANCES: *Charlie Ireton and T. Kowalczyk for the applicant; Allen Craig for the respondent.*

DECISION OF THE BOARD; June 14, 1979

1. This is the second application brought under section 55 of The Labour Relations Act by the applicant in which both the applicant and the respondent have agreed that the sale of a business took place as alleged by the applicant. The applicant seeks a declaration that the respondent is bound by a collective agreement between the Lakehead Hotelkeepers' Association and the applicant. The first application filed by the applicant (Board File No. 2159-78-R) under section 55 of the Act was dismissed by the Board on the ground that the applicant was unable to prove the existence of a collective agreement between the Lakehead Hotelkeepers' Association and the applicant.

2. In the instant matter the applicant filed a document purporting to be a collective agreement between it and The Lakehead Hotelkeepers' Association. The document is executed by the applicant and by The Lakehead Hotelkeepers' Association. The respondent is not named as a party to that document.

3. The applicant alleged that this document is a collective agreement and argued that the predecessor employer was bound by that collective agreement at the time the business was sold and that by virtue of section 55 of The Labour Relations Act, the respondent is now bound by that same collective agreement.

4. Counsel for the respondent argued that a condition precedent to finding that the respondent is bound by a collective agreement between the applicant and The Lakehead Hotelkeepers' Association is a determination by the Board that The Lakehead Hotelkeepers' Association is an employer's organization within the meaning of The Labour Relations Act.

5. Counsel for the respondent further argued that there are two conditions precedent to an employer being bound by a collective agreement between an employer's organization and a trade union. He submitted that under section 43(1) of the Act, in order for an employer to be bound by a collective agreement entered into between an employer's organization and a trade union, the employer must be a member of the organization and the organization must bargain on behalf of that member. (See *Paul D'Aoust*, [1976] Sept. OLRB Rep. 529 at 535).

6. In order for the applicant to succeed in this application, it must first establish that the document it claims is binding upon the respondent is a collective agreement within the meaning of the Act.

7. A collective agreement is defined by section 1(1)(e) of the Act as:

“an agreement in writing between ... an employer’s organization ... and a trade union ...”

8. Section 1(1)(h) defines an employer’s organization as:

“an organization of employers formed for purposes that include the regulation of relations between employers and employees ...”

9. Since the respondent is a stranger to the agreement and has specifically denied that it is bound by any collective agreement, it is up to the applicant to prove that the document it relies upon is a collective agreement within the meaning of the Act. In order to do so, the applicant must first establish that the Lakehead Hotelkeepers’ Association is an employer’s organization within the meaning of the Labour Relations Act.

10. The applicant called the President of the Association to identify the document. However the applicant adduced no evidence with respect to the formation or organization of the Association. Indeed, the President of the Association testified that he did not know whether or not there was a constitution and was not aware of the existence of any bylaws. Thus, there is no evidence before this Board to show that the Lakehead Hotelkeepers’ Association is an employer’s organization within the meaning of the Labour Relations Act. Therefore, the Board cannot find on the basis of the evidence presented to it that the document relied upon by the applicant is a collective agreement. (See *Cem-Al Spray Limited* [1974] OLRB Rep. Oct. 688 at 689.)

11. It may be noted that the type of evidence necessary to prove the status of an employer’s organization is not dissimilar from the type of evidence needed to prove the status of a trade union. That is, an employer’s organization must provide documentary evidence relating to the formation and constitution of the organization as a first step toward establishing itself as an employer’s organization within the meaning of the Act. (See *The Terrazzo Tile & Marble Guild of Ontario*, [1973] OLRB Rep. March 150 at 153.)

12. In this case the applicant has not come forward with any evidence relating to either the formation or constitution of The Lakehead Hotelkeepers’ Association. Under these circumstances, the Board is constrained to find that the applicant has failed to prove the existence of a collective agreement which it alleges is binding upon the respondent. The Board therefore cannot declare that the respondent is bound by a collective agreement.

13. This application is therefore dismissed.

2124-78-R Canadian Food & Allied Workers, Local 175, chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC, (Applicant), v. **Valdi Inc.** (Trading as Valdi Discount Foods), (Respondent).

Build up – Certification – Applicable in retail food industry – Applicable when new location opening within geographic scope of bargaining unit.

BEFORE: E. Norris Davis, Vice-Chairman, and Board Members D. B. Archer and C. G. Bourne.

APPEARANCES: *Doug Wray and Frank Kelly for the applicant; C. M. McKeown, Q.C. and B. W. Adams for the respondent.*

DECISION OF E. NORRIS DAVIS, VICE-CHAIRMAN AND BOARD MEMBER C. G. BOURNE; June 28, 1979

1. The name: "Valdi Discount Foods" appearing in the style of cause of this application as the name of the respondent is amended to read: "Valdi Inc. (Trading as Valdi Discount Foods)".
2. This is an application for certification.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.
4. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent in its stores in Hamilton, Ontario, save and except the Assistant Store Manager and persons above the rank of Assistant Store Manager, constitute a unit of employees of the respondent appropriate for collective bargaining.
5. The respondent argues that there was not present, at the date this application was made, a substantial and representative number of employees compared to what is reasonably anticipated to be the final complement of the work-force in the described unit. The Board called for written argument on this point and is indebted to counsel for the thorough manner in which the question has been examined.
6. The respondent was incorporated in late summer of 1978 for the purpose of establishing retail food outlets throughout the province. Two such stores were opened in Toronto in October, 1978, one store in Mississauga in November, 1978, and the store in Hamilton on which this application was based being opened on December 6, 1978.
7. The respondent submitted lists of employees indicating there to be 11 employees in the described bargaining unit, which list is subject to an outstanding challenge made by the applicant.
8. The respondent led evidence that it was planned to open two more stores which would fall within the unit above-described. In connection with one such store, it is to be located at Main and Garside and an Offer to Lease was executed on March 5, 1979 for these

premises. As of the date of the hearing, the evidence was that stocks had been purchased (as were fixtures for the store) and were in the respondent's warehouse, and that recruitment of personnel had been initiated for a planned opening on April 24th (subsequently to the hearing, set back to June 2nd).

9. The second store planned for opening is to be at Barton and Centennial, and located in a new building which is in process of final completion. Negotiations have been completed as to an offer to lease resulting in a signed document although there are some outstanding matters to be settled. A tentative date (dependent on building alterations) for opening of June 12, 1979 has been set. No personnel recruitment program had yet been initiated in respect to this location at the time of the hearing.

10. The evidence was that the respondent expected to have complements of 12 employees in each of the two projected locations and that these estimates are based on the specific locations and the volume of business expected to be generated. This compares to the two Toronto stores which employ 8 and 9 employees respectively, and the respondent explained that the Hamilton stores will have somewhat greater selling areas requiring more employees to service.

11. Based on these facts the respondent argues that there is an unequivocal planned expansion within the unit described and that the Board should apply the "build-up" principle and direct a representation vote to be taken at a time when the Board is satisfied that more than 50% of the anticipated complement of employees is present. The applicant takes the position that the Board's jurisprudence in respect to "build-up" has never been applied to multiple locations within a defined municipal area, and was never intended to be applied. The applicant also argues, alternatively, that if the Board should determine that the "build-up" principle has application, that the Board should consider reversing its long standing practice of defining bargaining units in this industry on a geographic basis, in order to permit a trade union to seek certification in an individual store basis.

12. The leading case in respect to "build-up" appears to be that of *Frant and Waselovich* 57 CLLC ¶18,057 where the Board set out three conditions required to bring the principle into operation, i.e. that the number of employees at work on the date of application does not constitute a substantial and representative segment of the ultimate work-force; that there is a real likelihood of a build-up of the work-force within a reasonable time (must be a planned program for expansion of work-force); and that the planned expansion is not dependent on factors beyond the employer's control.

13. The Board, in the *J. G. Fitzpatrick Construction* case 72 CLLC ¶16,050, in commenting on *Frant and Waselovich*, said:

"This representation principle, which has been set forth in *Frant and Waselovich* ... is the task of balancing the right, on the one hand, of persons presently employed to collective bargaining and the right, on the other hand, of future employees to select a bargaining unit of their own choice."

The Board, in the *Fitzpatrick* case, noted that it was not the usual practice of the Board to apply the build-up principle in construction industry cases because of the comparative

shortness of the typical construction employment relationship. Nonetheless, in that case, the Board found that the facts of the case were such that the principle of representation should take precedence.

14. In the prior construction industry case of *Industrial Mine Installations Ltd.* [1968] OLRB Rep. May 217 the Board similarly said:

“In other words, the representation principle must, in this case, take precedence over the short term employment features of the construction industry. Viewed in another way, if this is to be regarded as a case involving build-up then, in our opinion, the peculiar circumstances of this case make it one in which regard should be had to an increase in the number of employees in the bargaining unit after the application was made ...”

15. It is clear from these two cases that, in the construction industry, where the build-up principle has been infrequently applied, the factor which has tipped the balancing of competing rights has been the typical short term employment relationship which prevails in that industry. The fact that the Board's practice in construction cases is to fix the bargaining unit in reference to a geographic area (as is the practice in respect to the Retail Food Industry) does not appear to be a factor considered, and no evidence was led that operations of the type involved in the instant case have a short term employment relationship comparable to the construction industry.

16. The applicant argues that there has been no case in which the build-up of the work-force did not relate to an existing single facility, and not, as here, where the expansion of the work-force is contemplated to take place at locations physically separate from one another. Our review of the Board's jurisprudence confirms it to be in the state presented by the applicant but we do not find that to be persuasive in the determination of the instant case because the Board simply has not had that factual case raised.

17. The issue the Board must deal with is whether expansion of the work-force within a bargaining unit found to be appropriate is to be disregarded by virtue of such expansion being at physical locations physically separated from the location of present employees. In our view the representative principle must be applied on a basis which is co-extensive with the definition of the bargaining unit which the applicant seeks to represent. In other words, the issue of representation can only be tried within the same defined group of employees as will ultimately be represented by the applicant. It seems obvious to us that if there were facts which were to persuade us in this case that the issue of representation should be tried only amongst employees of the one location, those same facts would have to inexorably lead us to a determination of an appropriate bargaining unit which would be similarly restricted, which is also the applicant's alternative argument.

18. It is not disputed that there has been a long standing practice in the determination of appropriate bargaining units in this industry to consider all operations of the employer which fall within a municipal area. This practice has developed, in our opinion, out of a general recognition of the inter-relationship of employees, the fixing of store locations to maximize consumer usage, the movement and/or expansion of locations to follow consumer movement, company organizational structures and effective collective bargaining.

Collective bargaining relationships have been structured and matured on this basis, and while there might be special circumstances in which the Board should consider a reversal of, or exception to, its long standing practice, we are not persuaded that the instant application is that case.

19. The Board is satisfied that even if the applicant established a membership position exceeding fifty-five per cent of the employees present at the date of application, that this is a case in which the build-up principle should be applied. Based on the facts of the instant case and the planned opening of the Main and Garside store on April 24th (subsequently revised to May 2nd) there would at that time be present approximately fifty per cent of the anticipated complement of employees in the bargaining unit found by the Board to be appropriate.

20. The Board, based on all the evidence before it is satisfied that not less than forty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made were members of the applicant on March 30, 1979, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

21. A representation vote will be taken of the employees of the respondent in the bargaining unit. All employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

22. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

23. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER D. B. ARCHER:

1. I regret I am unable to concur with the conclusion reached by the majority in the instant case and must therefore dissent from it. The majority decision accurately records the relevant facts and correctly describes the Board's long standing practice of the principle of a planned build-up. The majority then goes on to conclude that the build-up principle is applicable on the facts in this case and it is with that conclusion that I am unable to agree.

2. The instant case requires the Board to consider the limitations of the applicability of the build-up principle. As the majority notes in paragraph 16 of the decision, the applicant has correctly pointed out that this principle has never been applied in a situation where, as here, the build-up is to occur at new and different locations, physically separated from the location of present employees. Accordingly, our conclusion on these facts will either expand the applicability of the build-up principle or confirm it to a single physical location. In my opinion, we should not expand the applicability of this long standing principle.

3. In applying the build-up principle the Board has always done so in its sole discretion and having regard to the circumstances of each case as a means of balancing the interest of the present employees to engage in collective bargaining now against the interests

of future employees to participate in the selection of their bargaining agent. See eg. *F. Lepper & Son Ltd.* [1977] Dec. OLRB Rep. 846 at 847.

4. In a single location, where the employer has a firm plan for an immediate build-up; where the actualization of the build-up is relatively certain and independent of market factors beyond the control of the employer; where it is to take place within a reasonable period of time and where, at the time of the application, the number of employees in the unit is less than fifty per cent of the anticipated total, the Board may properly exercise its discretion to find that there is a matter of fact a planned build-up, that the application is therefore premature and that the resolution of the application be delayed in a manner appropriate to the circumstances of the case. See *Powel Controls* [1967] OLRB Rep. Mar. 954 *Canron* [1967] OLRB Rep. Sept. 750; *Travelaire Trailor Mfg. Ltd.* [1970] OLRB Rep. Nov. 329; *Vulcan Equipment* [1974] OLRB Rep. May 285; *B. F. Goodrich Canada Ltd.* [1970] OLRB Rep. Sept. 655.

5. In the instant case, however, the applicant has made application for the employees in the unit while the full work force is in place in the only location operated by the respondent at the time of application. The build up claimed by the respondent is to occur entirely in other locations within the geographic area of the defined unit. In balancing the interests of the present employees, in these circumstances against the interests of future employees who will be employed at a new and physically remote location, are the purposes of the Act to promote orderly collective bargaining properly served? I think not.

6. In my opinion, to apply the build up principle to a case where the build-up is to occur entirely at a new and different location is to expand the application of this principle beyond the point where it serves any useful purpose having regard to the realities of labour relations. Such an application will in my view frustrate the express wishes of a majority of the employees in that unit and defeat the purposes of the Act.

7. In the construction industry as the majority notes the Board has only infrequently applied the build-up principle. (See paragraph 15). It has exercised its discretion in such cases by having regard to the short-term employment features of the construction industry. Only where the circumstances of a particular case justify it, will the Board apply the build-up principle in a construction industry case. See *J. G. Fitzpatrick Construction* 72 CLLC ¶16,050; or *Industrial Mine Installation Ltd.* [1968] OLRB Rep. May 217.

8. In my view, the Board ought to apply equal restraint in the exercise of its discretion in applying the build-up principle to the retail food store industry. In only one case, as the respondent agreed in its submissions, has this principle been applied in the retail food industry and there in circumstances where the build-up was to occur in the same store in the same physical location. See *Canada Safeway Ltd.* [1970] OLRB Rep. Feb. 1323.

9. While it is true that no evidence was led as to the duration of employment opportunities in the retail food industry such as might be established whether or not the same considerations ought to apply as apply in the construction industry, the respondent in its initial written submission made some observations which bear on that question, "... *In Re Dominion Stores Limited and Min-A-Mart Limited, and Re Discount Food Warehouse*, Board Files 0272-78-R, 0273-78-R and 0756-78-R as well as the *Re Valdi Discount Food* decision, Board File 1731-78-R, in which written reasons have not yet been issued, the Board was

faced with a variety of novel experimental approaches to food retailing. The retail food industry is such that innovation in retailing must be predicated upon the possibility of rapid expansion of new outlets if the innovative operations prove successful ...”

10. On the basis of those observations the respondent argued for the application of the build-up principle. In my view, however, those observations lead to an inference that employment in a rapidly changing industry is somewhat unstable. The operative phrase is ... “if the innovative operations prove successful ...”. If they are unsuccessful, what then becomes of the planned build-up? In my view, on the basis of that submission, the build-up is in fact dependent upon market factors beyond the control of the respondent. Accordingly, the Board should, in any such circumstance, refuse to apply the build-up principle.

11. For all of the reasons advanced herein, I would not apply the build-up principle in the instant case. Accordingly, I must, with respect, dissent from the decision of the majority. In this particular case I would have followed the Board’s usual practice and certified for the geographical area as claimed by the union.

0062-79-R Canadian Food & Allied Workers, Local 175, chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC, (Applicant), v. **Valdi Inc.** (trading as Valdi Discount Foods), (Respondent).

Build-up – Certification – Whether marketing objectives sufficient to establish likelihood of build-up

BEFORE: E. Norris Davis, Vice-Chairman, and Board Members J. D. Bell and O. Hodges.

APPEARANCES: *Harold F. Caley, Bill Hanley and Dennis Sexton for the applicant; B. W. Adams, H. Lutgens and P. Lebedowski for the respondent.*

DECISION OF E. NORRIS DAVIS, VICE-CHAIRMAN AND BOARD MEMBER J. D. BELL: June 27, 1979

1. The name: “Valdi Discount Foods” appearing in the style of cause of this application as the name of the respondent is amended to read: “Valdi Inc. (trading as Valdi Discount Foods)”.

2. This is an application for certification.

3. The Board finds that the applicant is a trade union within the meaning of section 1 (1) (n) of The Labour Relations Act.

4. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent in its stores in Metropolitan Toronto save and except the Assistant Store Manager and persons above the rank of Assistant Store Manager, constitute a unit of employees of the respondent appropriate for collective bargaining.

5. The respondent, which has been engaged in the retail food business since October 1978 at which time it opened two stores in Metropolitan Toronto, lead evidence that it intends to have 10 stores in the Metropolitan Toronto area by the end of 1979. Based on this objective, the respondent argues that there is not, on the date of this application, a substantial and representative number of employees present in the relation to the ultimate complement, and that the Board should therefore defer testing the representation issue until such time as a representative number of employees are present.

6. Mr. Peter Lebedowski, Director of Real Estate for Steinberg, Inc., the parent company of the respondent, testified that in mid-January 1979 he had been instructed to search out locations for a minimum of 10 units in the Metropolitan Toronto area by year-end. Lebedowski stated that he had evaluated some 75 locations and was encountering some difficulties in securing locations which would meet the pre-determined specifications of the Company. He testified he was currently negotiating with another retail chain in respect to a possible package acquisition of a number of their locations in the Metropolitan area, and that while there has been an exchange of correspondence relating to the matter, no formal offer has been submitted. When pressed for specific dates as to further openings in Metro, Lebedowski responded "I can't give exact dates, only my projections."

7. The "build-up" principle which the respondent urges the Board to apply in this case has been enunciated in the case of *Frant and Waselovich*, 57 CLLC ¶18,057 and outlines the essential elements to be considered by the Board in balancing the rights of persons presently employed to enjoy collective bargaining against the right of future employees to have a voice in the selection of a bargaining agent of their choice. One of the key elements to be considered by the Board is that there is a planned program for expansion of the work-force from which the Board can infer a real likelihood of a build-up of the work-force within a reasonable time. It is this element which, in our view, is absent in the instant case.

8. We consider that there is a substantial difference between a marketing objective, as here, of having a number of locations operating in a given area, and the proof of an overt commitment of capital and/or assumption of legal obligations which if followed through would inevitably result in implementing that marketing objective. Without evidence of that latter step, however valid the marketing objective may be, there is no evidence from which the Board can infer that there is a "real likelihood" of the build-up of the work-force within a reasonable time. Without the connecting link, despite the current commitment of the employer to the marketing objective, the Board can make no judgment as to when the work-force may be built-up, or indeed whether it will be. To defer the rights of present employees to collective bargaining based on such remote contingencies not completely within the control of the respondent, would not be an equitable balancing of rights.

9. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on April 18, 1979, the terminal date fixed for this application and the date which the Board determines, under section 92 (2) (j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7 (1) of the said Act.

10. A certificate will issue to the applicant.

DECISION OF BOARD MEMBER O. HODGES:

1. I concur in this decision to certify the applicant trade union, the result being that employees of present and new stores opened within the municipality will be automatically included within the bargaining unit for which the trade union has bargaining rights. It follows that a collective agreement flowing from the Board certificate will cover present and future employees whom the trade union is obliged to represent under the terms of the certification and the collective agreement to be negotiated.

2. I do not accept the build-up principle as being applicable in the retail industry. Each store unit is self contained and has its complement of job classifications and employees to perform its function as a store standing by itself. The build-up principle has application to an industrial plant, where each department makes up a part of that production unit. The same cannot be said of a marketing operation made up of a series of self contained units, each doing the complete job for which it was established.

0323-79-R United Brotherhood of Carpenters and Joiners of America,
Local Union 38, (Applicant), v. **258167 Vending Company Limited**,
(Respondent).

Certification – Construction Industry – Employer’s primary business not in construction industry – Whether employer operating a business in construction industry by hiring two carpenters for short time.

BEFORE: Ian C. A. Springate, Vice-Chairman and Board Members H. J. F. Ade and C. Ballentine.

DECISION OF THE BOARD: June 12, 1979

1. In this application for certification the applicant filed two certificates of membership. The certificates are signed by the members and indicate that monthly dues of \$23.00 have been paid for at least one month within the six month period immediately preceding the terminal date of the application. The certificates are checked and certified correct by an officer of the applicant. The applicant also filed a duly completed Form 54, Declaration Concerning Membership Documents, Construction Industry.

2. The respondent filed a reply, but failed to file a list of employees and specimen signatures within the time fixed in accordance with The Labour Relations Act and the Board’s Rules of Procedure.

3. In its reply the respondent made the following submissions:

“The respondent states that the fact is that it is not in the construction industry. The employees named herein were hired by the respondent for a limited period of time, to complete certain work for the respondent, which said work is normally done for the respondent by others in the construction industry. In this isolated case, the respondent, because

of a pressing time factor, felt it necessary to have the work performed for it by the said two employees. Never at any time has the respondent been an employer for the purposes of Sections 107-112 of The Labour Relations Act and never at any time has the respondent been involved in any business which could be deemed to be in the construction industry as defined in clause (f) of subsection 1 of section 1 of The Labour Relations Act. Upon completion of the work being performed by the said employees, no further or other such work is intended by the respondent. The respondent states that the fact is, that it understands that the said employees are already members of the Union, which may be the applicant Union and the certification of the respondent as a bargaining union were illusory and of no practical purpose or effect, because of the short-term nature of the work involved.

The respondent therefore submits that this application be refused on the basis that the facts upon which the application has been brought are of a temporary nature, and also that the respondent does not fall into categories and definitions specifically laid down by The Labour Relations Board of Ontario, in respect of this application."

4. From the above it would appear that although the respondent is not normally engaged in the construction industry, at the relevant time it did have two carpenters in its employ who were performing construction work. Section 106 (c) of the Act defines an employer for the purposes of the construction industry provisions of the Act as being "a person who operates a business in the construction industry". In applying this section the Board has consistently held that although an employer's main business may be outside the construction industry, nevertheless it may at the same time also be operating a business in the construction industry. This is so even if the employer does not anticipate doing any further construction work. See *Kapuskasing Board of Education*, [1972] OLRB Rep. June 587 and *The Corporation of the City of Toronto*, [1978] OLRB Rep. Dec. 1145. In these circumstances the Board is of the view that the respondent is an employer who operates a business in the construction industry.

5. The Board does not regard the fact that the work involved is of short duration to be sufficient grounds for not issuing a certificate. Indeed, in the construction industry the Board's general practice is not to take into account the amount of time which a particular project will take to completion. Rather, the question which the Board considers is whether or not there were any employees in the bargaining unit on the date of the making of the application. In this regard see both section 7 of the Act as well as *Traucott Construction Limited*, [1967] OLRB Rep. Feb. 920.

6. The Board finds that the applicant is a trade union within the meaning of section 1 (1) (n) of The Labour Relations Act.

7. The Board further finds that this is an application for certification within the meaning of section 108 of The Labour Relations Act.

8. The Board further finds that all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldi-

mand, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

9. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on May 28, 1979, the terminal date fixed for this application and the date which the Board determines, under section 92 (2) (j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7 (1) of the said Act.

10. A certificate will issue to the applicant.

0955-78-U Chatham Construction Workers Association, Local No. 53, affiliated with the Christian Labour Association of Canada, (Complainant), v. Gino Morga, Labourers' International Union of North America Local 625, Don Stewart, International Association of Bridge and Ironworkers Local 700, Essex and Kent Counties Building and Construction Trades Council, Ian Logan, Bill Roy, United Brotherhood of Carpenters and Joiners of America Local 494, **Woodall Construction Company Limited**, (Respondent).

Charges – Section 61 – Trade Union – Alleged conduct directed at trade union – union not person under Act – particulars disclosing no violation of section 61.

BEFORE: R. A. Furness, Vice-Chairman, and Board Members J. D. Bell and O. Hodges.

DECISION OF THE BOARD; June 27, 1979

1. The complainant has filed a complaint under section 79 of The Labour Relations Act and has complained that it has been dealt with by the respondents contrary to the provisions of sections 61 and 3 of the Act.

2. The complainant sought the following relief:

- “1. An order directing the Respondents to forthwith permit Malen to perform its obligations pursuant to its subcontract with Woodall.
2. An Order directing the Respondents and any person having notice of such Order to cease and desist from interfering [sic] with the contractual relationship which exists between Malen and Woodall.
3. An Order directing the Respondents and any person having notice of such Order to cease and desist from interfering [sic] with the right of the Complainant to act as bargaining agent for the labourers of Malen, in accordance with Certificates of the Ontario Labour Relations Board.

4. An Order directing the Respondents, and any person having notice of such Order, to cease and desist from interfering [sic] with the rights of the members of the Complainant, employees of Malen, from exercising their right to join a trade union of their choice and to participate in its lawful activities.
 5. An Order directing Woodall to carry out its contractual obligation to Malen.
 6. The payment of damages by the Respondents as compensation for loss of wages and other benefits suffered by employees of Malen, who are members of the bargaining unit represented by the Complainant, since such employees are unable to work for their employer, as a result of the activities of the Respondents."
3. At the conclusion of the hearing on September 27, 1978, the Board dismissed the complaint and stated that written reasons would follow. These reasons are now set forth.
4. In support of their request for relief the complainant complained of the following acts or omissions:
- "I By certificates of the Ontario Labour Relations Board, dated June 28, 1978, and August 23, 1978, respectively, Chatham Construction Workers, Local No. 53, affiliated with the Christian Labour Association of Canada, ("C.L.A.C.") was certified as bargaining agent for the labourers of Malen Steel and Salvage Limited ("Malen") in the residential, and in the industrial, commercial and institutional sectors respectively. C.L.A.C. is currently engaged in negotiations with Malen for a Collective Agreement.
 - II The two certificates referred to in the preceding paragraph were awarded to C.L.A.C. by the Board after representation votes, in which the C.L.A.C. displaced The Labourers' Union.
 - III Malen currently has a subcontract with a firm known as Woodall Construction Company Limited ("Woodall") which, in turn, is a general contractor for work with General Motors of Canada Limited at its Windsor transmission plant.
 - IV On or about August 14, 1978, at Windsor, Gino Morga, a business agent of The Labourers' Union, stated to Max Gumblich, President of Malen, that Malen would have problems on every job so long as it employed labourers represented by the Christian Labour Association of Canada.
 - V On or about August 24, 1978, at Windsor, the said Gino Morga, stated to David Woodall, the President of Woodall, that picket lines would be placed around all Woodall projects, if Woodall used Malen, because Malen's labourers were represented by the C.L.A.C., and that the mem-

bers of the The Labourers' Union refused to work alongside labourers who were represented by the C.L.A.C.

- VI On or about August 30, 1978, at Windsor, Don Stewart, a Business Agent of The Ironworkers Union and President of the Building Trades Council, spoke to the said David Woodall and to Fred Woodall, and stated that in the Windsor area, pickets who were picketting [sic] in support of a legal strike of The Carpenters Union would be withdrawn. However, Stewart, further said that such pickets would not be withdrawn on projects where Woodall was working, because Woodall used Malen as a subcontractor, and Malen, in turn, employed labourers represented by the C.L.A.C. In response to this, both David and Fred Woodall stated that Malen could do nothing else, because C.L.A.C. was certified for its labourers. Stewart then stated that Malen should start another company and employ labourers who were members of The Labourers' Union. Both Roy and Logan, or in the alternative, one or more of Roy and Logan were present at this meeting between Stewart and David and Fred Woodall, and stated to David and Fred Woodall that they agreed with the statements made by Stewart.
- VII In the course of the activities referred to in paragraphs (4), (5) and (6), Gino Morga was a Business Agent of The Labourers' Union and acted in the course of his employment as a Business Agent of The Labourers' Union. Stewart was a Business Agent of The Ironworkers' Union and President of the Building Trades Council, and acted in the course of his employment as Business Agent of The Ironworkers' Union and as President of the Building Trades Council. Roy and Logan were both Business Agents of The Carpenters Union, and acted within the scope of their employment as Business Agents of The Carpenters Union. Roy was also Secretary of the Building Trades Council and acted in the course of his employment as Secretary of the Building Trades Council.
- VIII At times, which at present are unknown to the Applicant, The Ironworkers' Union has refused to supply ironworkers to Malen, on the ground that members of The Ironworkers' Union would not work alongside labourers who were represented by C.L.A.C.
- IX Subsequent to the conversation with Stewart, referred to in paragraph (6), Woodall instructed Malen to stay off the job and advised Malen that Woodall would do Malen's work itself. As a result of the said action, Malen had been unable to carry out its subcontract with Woodall and Malen's workers have been deprived of their wages and other benefits."

5. Section 3 and section 61 of the Act state as follows:

- "3. Every person is free to join a trade union of his own choice and to participate in its lawful activities.

61. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act."

6. At the outset the Board emphasizes that section 3 is in the nature of a declaration of rights and does not in itself create an offence. The complaint in so far as it relates to section 3 is dismissed. See, for example, the *Mrs. Deborah Brown, Mr. Stephen Lewis* case, [1976] OLRB Rep. Feb. 4, and the *Winson Construction Limited* case, [1976] OLRB Rep. Nov. 714.

7. The alleged acts or omissions consist of nine paragraphs. Paragraphs I, II and III do not constitute acts or omissions by any of the respondents. The Board therefore focuses its attention on the remaining six paragraphs. Section 61 in the context of this complaint deals with intimidation or coercion in compelling any person to become or refrain from becoming or continue to be or to cease to be a member of a trade union or to refrain from exercising any other rights or from performing any obligations under The Labour Relations Act.

8. It seems clear that the complainant regards itself and its members or would-be members as the object of the intimidation, coercion and compulsion referred to in section 61. Nowhere in paragraphs IV to IX is "intimidation", "coercion", or "compel" mentioned by the complainant. While paragraphs IV to IX disclose a series of allegations which are no doubt viewed by the complainant as inimical to its best interests, such paragraphs do not allege an offence under section 61. However, be that as it may, the Board is of the same opinion that what occurred between the parties, as alleged in the acts or omissions complained of, is too remote from any of the employees who may have been concerned to raise any question of intimidation or coercion by the respondents within the meaning of section 61. In this regard, see the *Strand Millwork Limited and Centennial London Cabinets Limited* case, [1969] OLRB Rep. May 236.

9. There remains for consideration whether the complainant as a trade union has been compelled to refrain from exercising any other rights under the Act or from performing any obligations under the Act as contemplated by section 61. The word "trade union" is set forth in the first line of section 61 and the compulsion is envisaged with respect to any person. It is now well established in the Board's jurisprudence that a trade union is not a person for the purpose of interpreting The Labour Relations Act. In this regard see, for example, the *Rapid Typesetting Company Limited* case, [1969] OLRB Rep. Oct. 875; and the *De Vilbiss (Canda) Limited* case, [1976] OLRB Rep. March 49. In this regard the complainant relied heavily on the *Local 593 United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada et al* case, [1977] OLRB Rep. June 353. This case, however, involved a consent order and a subsequent modification. It did not consider whether the complainant trade union was a person within the meaning of section 61. Indeed, it appears from the terms of that decision that this point was neither raised nor argued before the Board.

10. The Board finds that the acts and omissions alleged by the complainant against the respondents do not allege a violation of section 61.

11. For the foregoing reasons the Board dismissed this complaint.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING MAY 1979

BARGAINING AGENTS CERTIFIED DURING MAY

No Vote Conducted

1989-77-R: International Union of Bricklayers and Allied Craftsmen, Local 4, Ontario (Applicant) v. Dr. Hillers Peppermint Canada Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of Dr. Hillers Peppermint Canada Limited in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in the unit).

1474-78-R: Carpenters' District Council of Toronto and Vicinity, Locals 27, 666, 681, 1133, 1747, 1304, 1963, 2842, 2480, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Pentagon Construction Canada Inc. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (16 employees in the unit).

1701-78-R: Retail Clerks Union, Local 206, Chartered by the Retail Clerks International Union (Applicant) v. Demarclin Funeral Services Limited, carrying on business under the name of Dermody-Markay Funeral Homes (Respondent) v. Cresmount Funeral Home (Intervener).

Unit: "all employees of the respondent in Hamilton, save and except manager, persons above the rank of manager and persons regularly employed for not more than 24 hours per week." (7 employees in the unit).

1907-78-R: United Steelworkers of America (Applicant) v. Fotomat Canada Limited (Respondent).

Unit: "all employees of the respondent engaged in its retail sales and distribution operations in Peterborough, save and except supervisors, persons above the rank of supervisor, office staff and persons covered by certificate issued by the Board in File No. 1747-78-R." (7 employees in the unit). (Having regard to the agreement of the parties).

2001-78-R: The Canadian Union of Public Employees (Applicant) v. St. Stephen's Community House (Respondent).

Unit: "all employees of the respondent employed in Metropolitan Toronto, save and except the Executive Director, Day Care Director, Program Director, Bookkeeper-Office Manager, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (23 employees in the unit). (*Having regard to the agreement of the parties*).

2077-78-R: Labourers' International Union of North America, Local 183 (Applicant) v. Duncanwoods Realty Limited (Respondent).

Unit: "all employees of the respondent engaged in cleaning and maintenance at 25 Duncanwoods Drive, Weston, in Metropolitan Toronto, including resident superintendents, save and except property manager, office and clerical staff." (2 employees in the unit). (*Having regard to the foregoing*).

2078-78-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1963, 1304, 2480, 2482, 1747, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. John Strathern Contracting (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

2100-78-R: Labourers' International Union of North America, Local 506 (Applicant) v. Exhibition Stadium Corporation (Respondent).

Unit: "all labourers in the employ of Exhibition Stadium Corporation, save and except foremen and persons above the rank of foreman." (6 employees in the unit). (*Having regard to the agreement of the parties*).

2120-78-R: United Electrical, Radio and Machine Workers of America (UE) (Applicant) v. Canadian Appliance Manufacturing Company Limited (Respondent).

Unit #1: "all employees of the respondent at Peterborough, Ontario, save and except supervisors and those above the rank of supervisor, office and clerical staff." (8 employees in the unit).

Unit #2: "all office and clerical employees of the respondent at Peterborough, Ontario, save and except supervisors and persons above the rank of supervisor." (2 employees in the unit).

2157-78-R: Service Employees Union, Local 204 affiliated with A.F. of L., C.I.O., C.L.C. (Applicant) v. Elm Tree Nursing Home (Respondent).
-- and --

0023-79-R: Service Employees International Union, affiliated with A.F. of L., C.I.O., C.L.C. (Applicant) v. Elm Tree Nursing (Respondent).

Unit: "all employees of Elm Tree Nursing Home, in Metropolitan Toronto, Ontario who are regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period save and except professional medical staff, registered nurses, graduate nurses, and undergraduate nurses, physiotherapists, occupational therapists, director of activities, supervisor, persons above the rank of supervisor, office staff and those persons covered under Board Interim Certificate No. 1031-78-R." (53 employees in the unit).

2158-78-R: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Peacock Lumber Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of Peacock Lumber Limited at Oshawa, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours a week and students employed during the school vacation period." (24 employees in the unit). (*Having regard to the agreement of the parties*).

2169-78-R: United Steelworkers of America (Applicant) v. Fotomat Canada Limited (Respondent).

Unit: “all employees of the respondent engaged in its retail sales and distribution operations in Port Hope, Ontario, save and except supervisors, persons above the rank of supervisor, office staff and persons covered by certificate issued by the Board in File No. 1747-78-R”. (2 employees in the unit). (*Having regard to the agreement of the parties*).

0002-79-R: Oil, Chemical & Atomic Workers International Union (Applicant) v. Leco Industries Limited, and Poly House Pkg. Limited (Respondents) v. Group of Employees (Objectors).

Unit: “all employees of the respondents at their plants in Rexdale, Ontario, save and except foremen and shift supervisors, persons above the rank of foreman and shift supervisor, office and clerical staff, laboratory staff, sales staff, security guards and students employed during the school vacation period.” (46 employees in the unit). (*Having regard to the representations of the parties*). (*clarity note – see Report of full decision [1979] Rep. May*).

0007-79-R: United Steelworkers of America (Applicant) v. Fotomat Canada Limited (Respondent).

Unit: “all employees of the respondent engaged in its retail sales and distribution operations in Markham, Ontario, save and except supervisors, persons above the rank of supervisor and office staff.” (2 employees in the unit). (*Having regard to the agreement of the parties*).

0032-79-R: The North American Soccer League Players Association (Applicant) v. (1) (The Toronto Blizzard Soccer Club) Processor Limited, and (2) The North American Soccer League (Respondents).

Unit: “all professional soccer players either on loan or otherwise employed by Prosoccer Limited in Metropolitan Toronto, including players on the following eligibility lists: actives, temporarily inactive, disabled, suspended, ineligible and military save and except Assistant Coach and those above the position of Assistant Coach.” (18 employees in the unit). (*Having regard to the agreement of the parties*).

0052-79-R: Christian Labour Association of Canada (Applicant) v. Grand Valley Ready Mixed Concrete Supply Limited (Respondent).

Unit: “all employees of the Respondent employed in the Township of Brantford in the County of Brant, save and except foremen, persons above the rank of foreman, office and sales staff.” (4 employees in the unit).

0053-79-R: Graphic Arts International Union, Local 542 (Applicant) v. Johanns Graphics Limited (Respondent).

Unit: “all employees of the respondent, save and except “Art Director”, “foreman” and persons above the rank of foreman, office and sales personnel.” (20 employees in the unit). (*Having regard to the agreement of the parties*).

0063-79-R: Amalgamated Meat Cutters and Butcher Workmen of North America, A.F.L., C.I.O., C.L.C. (Applicant) v. Mohawk Creamery Limited (Respondent).

Unit: “all employees of the respondent at Brantford, Ontario, save and except butter maker, those above the rank of butter maker, office and sales staff, students employed during the school vacation period and those persons regularly employed for not more than twenty-four (24) hours per week.” (5 employees in the unit). (*Having regard to the agreement of the parties*).

0064-79-R: Service Employees Union, Local 268 (Applicant) v. Tendercare Nursing Home Limited (Respondent).

Unit: "all employees of the Tendercare Nursing Home, at Sault Ste. Marie, Ontario, in the District of Algoma, regularly employed for not more than 22 ½ hours per week, save and except professional nursing staff, physiotherapists, occupational therapists, supervisors, foremen, persons above the rank of foreman or supervisor, office staff, students employed during the school vacation periods from May to September and persons covered by subsisting collective agreements." (26 employees in the unit). (*Having regard to the agreement of the parties*).

0074-79-R: Hotel and Restaurant Employees and Bartenders International Union, Restaurant, Cafeteria and Tavern Employees Union, Local 254 (Applicant) v. Domco Foodservices Limited (Respondent).

Unit: "all employees of the respondent at Oaks Hotel, located at Elliott Lake, Ontario, save and except Manager and office staff." (20 employees in the unit). (*Having regard to the representations of the applicant*).

0075-79-R: Labourers' International Union of North America, Local 183 (Applicant) v. Michael Shulman Associates Limited (Respondent).

Unit: "all employees employed by the respondent at 170 Ferrier Street, Markham, Ontario, save and except crew leaders, persons above the rank of crew leader, office, sales and clerical staff, draftsmen and students employed during the school vacation period." (43 employees in the unit). (*Having regard to the representations of the parties*).

0079-79-R: Office and Professional Employees International Union (Applicant) v. Kapuskasing Board of Education (Respondent) v. Kapuskasing Women Teachers' Association and Federation of Women Teachers Association of Ontario (Intervener).

Unit: "all office, clerical and technical employees of the respondent, save and except supervisors and persons above the rank of supervisor, audio visual technicians, teachers' aides, students employed during school vacation periods and persons covered by existing collective agreements binding upon the Board." (26 employees in the unit).

0080-79-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.) (Applicant) v. Precision Spring of Canada Limited – Plastics Division (Respondent).

Unit: "all employees of the respondent at Amherstburg, save and except foremen, persons above the rank of foreman, office and sales staff and quality control employees." (32 employees in the unit). (*Having regard to the agreement of the parties*).

0093-79-R: United Brotherhood of Carpenters and Joiners of America (Applicant) v. Dillion Construction Company Ltd. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

0094-79-R: Service Employees Union, Local 210, Affiliated with Service Employees International Union, AFL-CIO-CLC (Applicant) v. Peter Nursing Home Limited (Respondent).

Unit: "all employees of Peter Nursing Home Limited at Tilbury, Ontario, who are regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except professional nursing staff, physiotherapists, occupational therapists, supervisors, foremen, persons above the rank of supervisor or foreman, office staff." (19 employees in the unit).

0095-79-R: Pharmacists and Professional Employees Association, Local 1976 Chartered by the Retail Clerks International Union (Applicant) v. Bradley Nursing Homes Ltd. (Respondent) v. Employee (Objector).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except registered nurses, the Activity Director, Supervisors, and persons above the rank of registered nurses and supervisor and office staff." (18 employees in the unit). (*Having regard to the agreement of the parties*).

0105-79-R: International Union of Operating Engineers, Local 793 (Applicant) v. Sundown Construction Ltd. (Respondent).

Unit: "all employees of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

0107-79-R: United Steelworkers of America (Applicant) v. McKnight Window Industries Limited (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff." (36 employees in the unit).

0110-79-R: Retail Clerks Union, Local 206 (Applicant) v. Makita Power Tools, Canada Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except the accounting manager, persons above the rank of accounting manager and sales staff." (6 employees in the unit). (*Having regard to the agreement of the parties*).

0120-79-R: Labourers' International Union of North America, Local 183 (Applicant) v. Pedlar Storage Products (A Division of Pedlar Industrial Inc.) (Respondent).

Unit: "all employees of the respondent at Brampton, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (23 employees in the unit). (*Having regard to the agreement of the parties*).

0121-79-R: Service Employees International Union, Local 183 AF of L, C.I.O., C.L.C. (Applicant) v. Beacon Hill Lodges of Canada Ltd./Ottawa (Respondent).

Unit: "all employees of the respondent in Ottawa, Ontario, employed as office staff save and except registered and graduate nurses, physiotherapists, occupational therapists, accountants, supervisors, foremen, persons above the rank of foremen, and persons covered by subsisting collective agreements." (9 employees in the unit). (*Having regard to the agreement of the parties*).

0123-79-R: Ontario Public Service Employees Union (Applicant) v. The Greater Niagara General Hospital (Respondent).

Unit: "all paramedical personnel of the respondent at Niagara Falls, Ontario, working not more than 24 hours per week, save and except assistant chief technologist and persons above the rank of assistant chief technologist, office staff and persons covered by subsisting collective agreements." (5 employees in the unit). (*clarity note*)

0124-79-R: Ontario Public Service Employees Union (Applicant) v. London and District Association for the Mentally Retarded (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in London, Ontario, save and except supervisors and co-ordinators and persons above such rank, office and clerical employees, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (54 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note*)

0125-79-R: Ontario Public Services Employees Union (Applicant) v. Halton Developmental Centre (Burlington and District Association for the Mentally Retarded (Respondent) v. Employee (Objector).

Unit: "all professional employees of the respondent in Milton, Ontario, save and except the Director and persons above the rank of Director, office and clerical staff." (9 employees in the unit). (*clarity note*)

0126-79-R: Labourers' International Union of North America, Local 506 (Applicant) v. Mar-Gam Systems Ltd. (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario employed on building projects except residential building projects, but including labourers employed as helpers of bricklayers and plasterers, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

0130-79-R: Retail Clerks Union, Local 486, Chartered by the Retail Clerks International Union (Applicant) v. Walkley IGA (Respondent).

Unit: "all employees of Walkley IGA employed in the retail stores owned and/or operated by the company in Ottawa, Ontario, save and except store managers and persons above the rank of store manager." (61 employees in the unit). (*Having regard to the agreement of the parties*).

0133-79-R: Labourers' International Union of North America, Local 183 (Applicant) v. Gerry Macera Contracting Ltd. (Respondent).

Unit: "All construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

0135-79-R: Service Employees Union, Local 210, Affiliated with Service Employees International Union, AFL-CIO-CLC (Applicant) v. Country Village Inc. (Respondent).

Unit: "all employees of Country Village Inc. regularly employed at its nursing home and lodge at Woodslee, Ontario for not more than 22 ½ hours per week save and except professional medical staff,

registered nurses, supervisors, persons above the rank of supervisor, office staff, dieticians, physiotherapists, occupational therapists, and persons covered by subsisting collective agreements.” (36 employees in the unit). (*Having regard to the agreement of the parties*).

0137-79-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. Mike’s Supermarket (1962) Limited (Respondent).

Unit #1: “all employees of Mike’s Supermarket (1962) Limited engaged in the company’s retail food operations in Timmins, Ontario save and except head cashier supervisor, assistant store manager, persons above the rank of assistant store manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation periods.” (34 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: “all employees of Mike’s Supermarket (1962) Limited engaged in the company’s retail food operations in Timmins, Ontario regularly employed for not more than 24 hours per week and students employed during the school vacation periods, save and except head cashier supervisor, assistant store manager and persons above the rank of assistant store manager.” (89 employees in the unit). (*Having regard to the agreement of the parties*).

0141-79-R: Laundry and Linen Drivers and Industrial Workers Union, Local 847, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. The Parisian Laundry Co. of Toronto Limited (Respondent).

Unit: “all employees of the respondent employed as drivers at its plant in Metropolitan Toronto.” (3 employees in the unit).

0148-79-R: The Hotel and Club Employees’ Union, Local 299 Toronto, Ontario of the Hotel and Restaurant Employees’ and Bartenders’ International Union (A.F.L. – C.I.O. – C.I.C.) (Applicant) v. Hotel Brampton (Respondent).

Unit #1: “all employees of the respondent at the Hotel Brampton, Brampton, Ontario, save and except department heads and persons above the rank of department head, office and sales staff and persons employed for less than twenty-four (24) hours per week and students employed for the school vacation period.” (29 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: “all employees of the respondent at the Hotel Brampton, Brampton, Ontario, employed for less than twenty-four (24) hours per week and students employed for the school vacation period, save and except department heads, persons above the rank of department head, office and sales staff.” (6 employees in the unit).

0149-79-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Dektite Limited (Respondent).

Unit: “all employees of the respondent engaged in waterproofing and/or restoration work in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit).

0150-79-R: Hotels, Clubs, Restaurants, Tavern, Employees, Union, Local 261 (Applicant) v. Fuller’s Restaurant (Respondent) v. Group of Employees (Objectors).

- and -

0153-79-R: The Hotels, Clubs, Restaurants, Tavern Employees’ Union, Local 261 (Applicant) v. Fuller’s Restaurant (Respondent) v. Group of Employees (Objectors).

Unit #1: "all employees of the respondent working at 809 Richmond Road, Ottawa, Ontario, save and except assistant managers, management trainees, kitchen managers and persons above those ranks, office staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (37 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent working at 809 Richmond Road, Ottawa, Ontario, who are regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except assistant managers, management trainees, kitchen managers and persons above those ranks and office staff." (18 employees in the unit).

0151-79-R: United Steelworkers of America (Applicant) v. Borden Chemical, Division of The Borden Company, Limited, Printing Ink Division (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office, clerical, technical and sales staff." (13 employees in the unit). (*Having regard to the agreement of the parties*).

0152-79-R: United Steelworkers of America (Applicant) v. Ram Partitions Limited (Respondent).

Unit: "all employees of the respondent company in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff." (23 employees in the unit). (*Having regard to the agreement of the parties*).

0160-79-R: International Union of Bricklayers and Allied Craftsmen Local 4 Ontario (Applicant) v. E and D Masonary Contractors (Respondent).

Unit: "all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

0163-79-R: Canadian Union of Restaurants & Related Employees (Applicant) v Foodcorp Limited, carrying on business as Swiss Chalet Bar B.Q. (Respondent).

Unit: "all waitresses, waiters, busboys, kitchen staff, and cashiers employed by the Respondent at 1110 O'Connor Drive in the City of Toronto in the Municipality of Toronto, save and except hostesses and persons above the rank of hostess." (50 employees in the unit). (*Having regard to the agreement of the parties*).

0164-79-R: Canadian Union of Restaurants & Related Employees (Applicant) v. Foodcorp Limited, carrying on business as Swiss Chalet Bar B.Q. (Respondent).

Unit: "all waitresses, waiters, busboys, kitchen staff, and cashiers employed by the Respondent at 362 Yonge Street in the City of Toronto in the Municipality of Metropolitan Toronto, save and except hostesses and persons above the rank of hostess." (39 employees in the unit). (*Having regard to the agreement of the parties*).

0166-79-R: Canadian Union of Restaurants & Related Employees (Applicant) v. Foodcorp Limited carrying on business as Swiss Chalet Bar B.Q. (Respondent).

Unit: "all waitresses, waiters, busboys, kitchen staff, and cashiers employed by the Respondent at 2930 Carling Avenue in the City of Ottawa in the Regional Municipality of Ottawa-Carleton, save

and except hostesses and persons above the rank of hostess.” (35 employees in the unit). (*Having regard to the agreement of the parties*).

0171-79-R: United Steelworkers of America (Applicant) v. Fotomat Canada Limited (Respondent).

Unit: “all employees of the respondent engaged in its retail sales and distribution in the City of Belleville, save and except supervisors and persons above the rank of supervisor.” (2 employees in the unit). (*Having regard to the agreement of the parties*).

0172-79-R: United Steelworkers of America (Applicant) v. Fotomat Canada Limited (Respondent).

Unit: “all employees of the respondent engaged in its retail sales and distribution in the City of Trenton, save and except supervisors and persons above the rank of supervisor.” (2 employees in the unit). (*Having regard to the agreement of the parties*).

0173-79-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Superior Sodding Co. (Respondent).

Unit: “all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Town of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman.” (4 employees in the unit).

0182-79-R: Service Employees International Union, Local 210 (Applicant) v. Watford Nursing Homes Incorporated (Respondent).

Unit: “all employees of Watford Nursing Home Incorporated at Watford, Ontario regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered nurses and office staff.” (20 employees in the unit). (*Having regard to the agreement of the parties*).

0183-79-R: Service Employees International Union, Local 210 (Applicant) v. Watford Nursing Homes Incorporated (Respondent).

Unit: “all employees of Watford Nursing Home Incorporated at Watford, Ontario save and except supervisors, persons above the rank of supervisor, registered nurses, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and office staff.” (17 employees in the unit). (*Having regard to the agreement of the parties*).

0185-79-R: United Steelworkers of America (Applicant) v. Fotomat Canada Limited (Respondent).

Unit: “all employees of the respondent engaged in its retail sales and distribution in the Town of Oakville, save and except supervisors and persons above the rank of supervisor.” (6 employees in the unit). (*Having regard to the agreement of the parties*).

0203-79-R: Canadian Union of Public Employees (Applicant) v. Toronto Western Hospital (Respondent).

Unit: “all employees employed by the respondent in the detoxification centre located at 16 Ossington Avenue, Toronto, Ontario, save and except the supervisor, director, persons regularly employed for more than twenty-four hours per week, and persons covered by a subsisting collective agreement.” (3 employees in the unit). (*Having regard to the agreement of the parties*).

0206-79-R: United Brotherhood of Carpenters and Joiners of America, Local Union 38 (Applicant) v. Atlas Display Store Fixtures & Refrigeration Ltd. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in The Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0209-79-R: United Brotherhood of Carpenters and Joiners of America, Local Union 38 (Applicant) v. Geron Associates Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit). (*clarity note*)

0223-79-R: United Steelworkers of America (Applicant) v. Western Aluminum Products, Trail Wind Division of Indal Products Limited (Respondent).

Unit: "all employees of the respondent in Brampton, save and except foremen, persons above the rank of foreman, office and sales staff." (51 employees in the unit). (*Having regard to the agreement of the parties*).

0228-79-R: Burnstein Castings Employees' Association (Applicant) v. Burnstein Castings Ltd. (Respondent).

Unit: "all employees of the respondent in St. Catharines, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (154 employees in the unit).

0238-79-R: Shopmen's Local Union No. 834 of the International Association of Bridge, Structural and Ornamental Iron Workers (Applicant) v. Welded Grating Limited (Respondent).

Unit: "all employees of the respondent in the Town of Pickering save and except foremen, persons above the rank of foreman, office and clerical staff, draftsmen, watchmen, persons engaged in field erection work, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (11 employees in the unit).

0243-79-R: Chatham Construction Workers Association, Local No. 53, affiliated with the Christian Labour Association of Canada (Applicant) v. Lino's Electric (Respondent).

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0248-79-R: Milk and Bread Drivers, Dairy Employees, Caterers, and Allied Workers, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Silverwood Dairies Ltd. Div. of Silverwood Industries Ltd. (Respondent).

Unit: "all office employees of the respondent in North Bay, save and except office supervisor, persons above the rank of office supervisor, sales personnel, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period." (4 employees in the unit).

0253-79-R: United Brotherhood of Carpenters and Joiners of America, Local Union 38 (Applicant) v. Canadian Chair Services Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0254-79-R: United Steelworkers of America (Applicant) v. Fotomat Canada Limited (Respondent).

Unit: "all employees of Fotomat Canada Limited engaged in retail sales in the Town of Lindsay, save and except supervisors and persons above the rank of supervisor." (2 employees in the unit). (*Having regard to the agreement of the parties*).

0255-79-R: Service Employees Union, Local 268 (Applicant) v. Plummer Memorial Public Hospital (Respondent).

Unit: "all employees of the respondent at Sault Ste. Marie, Ontario in the district of Algoma, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, technical personnel, supervisors, persons above the rank of supervisor, foremen and persons above the rank of foreman, chief engineer, office and clerical staff." (88 employees in the unit).

0264-79-R: International Union of Operating Engineers, Local 793 (Applicant) v. Cafagna Bros. Construction Limited (Respondent).

Unit: "all employees of the respondent in the County of Grey engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0281-79-R: Canadian Union of Public Employees (Applicant) v. Winchester District Memorial Hospital (Respondent).

Unit: "all employees of the respondent employed at the Winchester District Memorial Hospital, Winchester, Ontario, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, technical personnel, supervisors, persons above the rank of supervisor, office and clerical staff, chief engineer, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period, persons covered by any subsisting collective agreement." (82 employees in the unit). (*Having regard to the agreement of the parties*).

0284-79-R: International Union of Operating Engineers, Local 793 (Applicant) v. Tamar Construction Ltd. (Respondent).

Unit: "all employees of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in the unit).

0287-79-R: The International Brotherhood of Painters and Allied Trades Local Union 1824 (Applicant) v. Econo Painting & Decorating (Respondent).

Unit: "all painters and painters' apprentices in the employ of the respondent in the County of Wellington, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0293-79-R: Chatham Construction Workers Association, Local No. 53 affiliated with Christian Labour Association of Canada (Applicant) v. Eureka Contractors (Windsor) Ltd. (Respondent).

Unit: "all carpenters, carpenters' apprentices and construction labourers employed by the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit). (*Having regard to the foregoing*).

0335-79-R: International Brotherhood of Painters and Allied Trades Local Union 1891 (Applicant) v. Convert-A-Wall Ltd. (Respondent).

Unit: "all painters and painters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit). (*clarity note*)

0343-79-R: Labourers' International Union of North America, Local 183 (Applicant) v. King Cross Construction (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman." (12 employees in the unit).

Application Certified Subsequent to Pre-Hearing Vote

2029-78-R: Canadian Paperworkers Union (Applicant) v. Gibson Greeting Cards, Limited (Respondent).

Unit: "all employees of the respondent in Brampton, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (45 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	41
Number of persons who cast ballots	39
Ballots segregated and not counted	1
Number of ballots marked in favour of applicant	31
Number of ballots marked against applicant	7

Applications Certified Subsequent to Post-Hearing Vote

0838-78-R: Ontario Public Service Employees Union (Applicant) v. Windsor Western Hospital Centre Inc. (Respondent) v. Group of Employees (Objectors).

Unit: "all paramedical employees of Windsor Western Hospital Centre, Inc. in Windsor, Ontario save and except: Professional Medical Staff, Dept. Heads, Chiefs, Assistant Chiefs, Directors, Assistant Directors, Supervisors and those above the rank of Supervisors, Interns and Students and Employees covered by subsisting collective agreements." (134 employees in the unit). (*clarity note* – see Report of full decision (1979) OLRB Rep. May).

Number of names of persons on revised voters' list		132
Number of persons who cast ballots		108
Ballots segregated and not counted	20	
Number of ballots marked in favour of applicant	62	
Number of ballots marked against applicant	26	

1670-78-R: Canadian Resin Workers Union No. 187 National Council of Canadian Labour (Applicant) v. C.G.T. Industries Ltd. (Respondent) v. United Rubber, Cork, Linoleum and Plastic Workers of America (Intervener).

Unit: "all employees of the respondent at Burlington, save and except foremen and foreladies, persons above the rank of foreman and forelady, office, quality control and sales staff." (16 employees in the unit).

Number of names of persons on revised voters' list		46
Number of persons who cast ballots		45
Number of ballots marked in favour of applicant	1	
Number of ballots marked in favour of intervener	44	

1992-78-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Hanover and District Hospital (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of Hanover and District Hospital at Hanover regularly employed for not more than twenty-four hours per week and students employed during the school vacation period save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, technical personnel, supervisors, persons above the rank of supervisor, office staff, student radiology technicians, student medical laboratory technicians." (19 employees in the unit).

Number of names of persons on list as originally prepared by employer		16
Number of persons who cast ballots		5
Number of ballots marked in favour of applicant	5	
Number of ballots marked against applicant	0	

2016-78-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Unger Warehousing (Canada) Ltd. (Respondent).

Unit: "all employees of the respondent in Windsor, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (9 employees in the unit). (*clarity note*)

Number of names of persons on list as originally prepared by employer		9
Number of persons who cast ballots		9
Number of ballots marked in favour of the applicant	9	
Number of ballots marked against the applicant	0	

2114-78-R: Canadian Union of Public Employees (Applicant) v. Barton Place Nursing Home (Respondent).

Unit: "all employees of the respondent regularly employed for not more than twenty-four (24) hours per week in Toronto, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, technical personnel, security guards, supervisors, persons above the rank of supervisor, office and clerical staff and persons covered by subsisting collective agreements." (13 employees in the unit).

Number of names of persons on list as originally prepared by employer		11
Number of persons who cast ballots	5	
Ballots segregated and not counted	1	
Number of ballots marked in favour of applicant	3	
Number of ballots marked against applicant	1	

0034-79-R: Service Employees International Union Affiliated with A.F. of L., C.I.O., C.L.C. (Applicant) v. The Ontario Jockey Club (Respondent).

Unit: "all cleaners employed by the Ontario Jockey Club at Greenwood Race Track, Woodbine Race Track in Metropolitan Toronto and Mohawk Raceway in the Town of Milton, save and except persons above the rank of foreman, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and persons covered by subsisting collective agreements." (48 employees in the unit).

Number of names of persons on revised voters' list		43
Number of persons who cast ballots	36	
Ballots segregated and not counted	4	
Number of ballots marked in favour of applicant	22	
Number of ballots marked against applicant	10	

0108-79-R: United Steelworkers of America (Applicant) v. Dresser Industries Canada, Ltd. Industrial Products Division Mississauga Service Centre (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Mississauga, save and except foremen, persons above the rank of foreman, office and sales staff." (22 employees in the unit).

Number of names of persons on revised voters' list		21
Number of persons who cast ballots	21	
Number of ballots marked in favour of applicant	13	
Number of ballots marked against applicant	8	

APPLICATIONS FOR CERTIFICATION DISMISSED

No Vote Conducted

1274-78-R: Teamsters Local 880 affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Sarnia Golf and Curling Club Limited (Respondent). (3 employees).

1398-78-R: United Brotherhood of Carpenters and Joiners of America (Applicant) v. Danway Industries Limited (Respondent). (54 employees).

1717-78-R: Canadian Union of Public Employees (Applicant) v. City of Brockville (Oakland Cemetery Workers) (Respondent). (2 employees).

2065-78-R: Service Employees Union Local 268 (Applicant) v. Lakehead Board of Education (Respondent) v. Lakehead Women Teachers' Association and Federation of Women Teachers Association of Ontario (Intervener). (70 employees).

0139-79-R: Chatham Construction Workers Association, Local No. 53 affiliated with Christian Labour Association of Canada (Applicant) v. Eureka Contractors (Windsor) Ltd. (Respondent). (2 employees).

0280-79-R Canadian Union of Public Employees (Applicant) v. Winchester District Memorial Hospital (Respondent) v. Employee (Objector).

Unit: "all employees of the respondent regularly employed for not more than twenty-four hours per week at the Winchester District Memorial Hospital, Winchester, Ontario, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, technical personnel, supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for more than twenty-four hours per week, students employed during the school vacation period and persons covered by any subsisting collective agreement." (8 employees in the unit). (*Having regard to the agreement of the parties*).

0282-79-R: Canadian Union of Public Employees (Applicant) v. Winchester District Memorial Hospital (Respondent).

Unit: "all office and clerical employees of the respondent employed at the Winchester District Memorial Hospital, Winchester, Ontario, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, secretary to the Administrator of the hospital, supervisors, foremen, persons above the rank of supervisor and foreman, technical staff, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period." (19 employees in the unit). (*Having regard to the agreement of the parties*).

Certification Dismissed Subsequent to Pre-Hearing Vote

2129-78-R: Canadian Union of Operating Engineers & General Workers (Applicant) v. Kellogg Salada Canada Inc. (Respondent) v. Bakery Confectionery & Tobacco Workers' Int'l. Union Local 264 (Intervener).

Voting Constituency: "All employees of the respondent at its plant at 325 Humber College Blvd. in the Borough of Etobicoke save and except stationary engineers, sales, office, clerical, laboratory, quality assurance, and security personnel, supervisors and those above the rank of supervisor." (177 employees).

Number of names of persons on list as originally prepared by employer		177
Number of persons who cast ballots	143	
Number of ballots marked in favour of applicant	68	
Number of ballots marked in favour of intervener	75	

2149-78-R: Teamsters Local Union No. 419 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. The Globe and Mail Division of F.P. Publications (Eastern) Limited (Respondent).

Voting Constituency: "All employees of the respondent employed in the Municipality of Metropolitan Toronto in the respondent's classified and display advertising departments, save and except supervisors and co-ordinators, persons above the rank of supervisor and co-ordinator, secretaries to the director of advertising sales, the national advertising sales manager, the retail advertising sales manager, the classified advertising manager, the assistant classified advertising manager, persons regularly employed for not more than twenty-four (24) hours and students employed during the school vacation period." (122 employees).

Numbers of names of persons on revised voters' list		122
Number of persons who cast ballots		110
Number of ballots marked in favour of applicant	42	
Number of ballots marked against applicant	68	

Certification Dismissed Subsequent to Post-Hearing Vote

1509-78-R: Labourers' International Union of North America, Local 183 (Applicant) v. Pachino Construction Company Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman." (23 employees in the unit).

Number of names of persons on list as originally prepared by employer		20
Number of persons who cast ballots		20
Number of ballots marked in favour of applicant	10	
Number of ballots marked against applicant	10	

1981-78-R: Teamsters Union, Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Henderson Machinery Moving and Installation Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent working at and out of Mississauga, Ontario, save and except foremen, persons above the rank of foreman, dispatchers, office and sales staff ... affiliated Local Unions." (25 employees in the unit).

Number of names of persons on revised voters' list		23
Number of persons who cast ballots		23
Number of ballots marked in favour of applicant	10	
Number of ballots marked against applicant	13	

APPLICATIONS FOR CERTIFICATION WITHDRAWN

1969-77-R: Labourers' International Union of North America, Local 506 (Applicant) v. Aquatite (1971) Limited (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers' and Cement Masons' International

Association of the United States and Canada (Intervener #2) v. Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local Union 124, Ottawa – Hull (Intervener #3). (8 employees).

0051-79-R: United Brotherhood of Carpenters and Joiners of America, Local Union 446 (Applicant) v. Cooper's Crane Rental Limited (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener). (2 employees).

0143-79-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1963, 2480, 2482, 3227, 1747 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. L. D'Amour Inc. (Respondent). (6 employees).

0210-79-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.) (Applicant) v. Superior Metal Finishing Ltd. (Respondent). (31 employees).

0244-79-R: International Union of Operating Engineers, Local 793 (Applicant) v. Ellis-Don Limited (Respondent). (3 employees).

0245-79-R: United Brotherhood of Carpenters and Joiners of America – Local Union 93 (Applicant) v. Coffrages Industriels Ltee (Respondent). (4 employees).

0294-79-R: Service Employees Union, Local 204 Affiliated with A.F. of L., C.I.O., C.L.C. (Applicant) v. Bestview Services Ltd., Ottawa (Respondent). (7 employees).

0331-79-R: Teamsters Local 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Northland Bitulithic Limited (Respondent). (6 employees).

0355-79-R: The United Brotherhood of Carpenters and Joiners of America (Applicant) v. Eastern Canada Contractors Limited, Eastern Canada General Contractors (Respondents). (4 employees).

APPLICATIONS UNDER SECTION 1(4)

1415-78-R: Labourers' International Union of North America; Labourers' International Union of North America, Ontario Provincial District Council; and Labourers' International Union of North America, Local 1059 (Applicants) v. Evans-Kennedy Construction Limited, and Celtic Construction (London) Ltd. (Respondents).

- and -

1416-78-R: International Association of Bridge, Structural and Ornamental Ironworkers; Ironworkers District Council of Ontario; and The International Association of Bridge, Structural and Ornamental Ironworkers, Local 700 (Applicants) v. Evans-Kennedy Construction Limited, and Celtic Construction (London) Ltd. (Respondents).

- and -

1417-78-R: The United Brotherhood of Carpenters and Joiners of America, The Ontario Provincial Conference of the United Brotherhood of Carpenters and Joiners of America and the United Brotherhood of Carpenters and Joiners of America, Local 1946 (Applicants) v. Evans-Kennedy Construction Limited, and Celtic Construction (London) Ltd. (Respondents).

- and -

1418-78-R: The International Union of Bricklayers and Allied Craftsmen, The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, and The International Union of Bricklayers and Allied Craftsmen, Local 5 (Applicants) v. Evans-Kennedy Construction Limited, and Celtic Construction (London) Ltd. (Respondents).

- and -

1419-78-R: The International Union of Operating Engineers, Local 793 of The International Union of Operating Engineers (Applicants) v. Evans-Kennedy Construction Limited, and Celtic Construction (London) Ltd. (Respondents). (2 employers). (*Granted*).

2082-78-R: International Brotherhood of Painters and Allied Trades, and Ontario Council of the International Brotherhood of Painters and Allied Trades (Applicants) v. Norbert Almeida Painting & Decorating and Normandy Painting & Decorating (Respondents). (*Granted*).

2083-78-R: International Brotherhood of Painters and Allied Trades, and Ontario Council of the International Brotherhood of Painters and Allied Trades (Applicants) v. Atlantida Painting and Decorating, and Kipling Decorators (Respondents). (*Granted*).

2093-78-R: Retail, Wholesale, Bakery and Confectionery Workers' Union, Local 461 (Applicant) v. General Bakeries Limited (Mammy's Wonder Bread Division) (Respondent) v. Group of Employees (Objectors). (*Dismissed*).

APPLICATION UNDER THE EMPLOYEES HEALTH & SAFETY ACT

0236-79-U: United Steelworkers of America, Local 4752 and F. Thurlby (Complainants) v. Burlington Steel, Division of Slater Steel Industries Limited (Respondent). (*Withdrawn*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1713-78-R: John Sousa and a Group of Employees (Applicants) v. Service Employees International Union Local 204 (Respondent) v. Modern Building Cleaning Division of Dustbane Enterprises Limited (Intervener). (*Terminated*).

Unit: "all employees of Modern Building Cleaning Division of Dustbane Enterprises Limited at the Toronto Dominion Centre, save and except resident manager, office or sales personnel, chief matron, assistant chief matron, night supervisor and day foreman." (292 employees in the unit).

Number of names of persons on revised voters' list	296
Number of persons who cast ballots	270
Number of spoiled ballots	3
Number of ballots marked in favour of Respondent	12
Number of ballots marked against Respondent	255

1807-78-R: Margaret Rouse and Employees (Applicant) v. The Hotel and Restaurant Employees and Bartenders International Union, Local 412 (Respondent). (*Granted*).

Unit: "all employees of United Steelworkers of America (Social Club) Local 2251 in the club or beverage room, save and except manager, persons above the rank of manager, and office staff." (6 employees in the unit).

Number of names of persons on revised voters' list		9
Number of persons who cast ballots	9	
Number of ballots marked in favour of the respondent	4	
Number of ballots marked against the respondent	5	

1911-78-R: Peter Bellion on behalf of himself and other employees of Northern Telecom Limited (Applicant) v. United Electrical Radio and Machine Workers of America (UE) and its Local 531 (Respondent) v. Northern Telecom Canada Limited (Intervener). (*Granted*).

Unit: "Employees of the respondent engaged in the manufacture of Central Office Switching Equipment in the Regional Municipalities of Peel and York, save and except those employed in the repair and distribution of communications and related equipment, section managers, persons above the rank of section manager, registered nurses, stationery engineers and office staff." (1351 employees in the unit).

Number of names of persons on revised voters' list		1345
Number of persons who cast ballots	1009	
Ballots segregated and not counted	76	
Number of ballots marked in favour of Respondent	418	
Number of ballots marked against Respondent	515	

1957-78-R: Louise Morin (Applicant) v. Local 756 Of the Hotel and Restaurant Employee's and Bartenders' International Union (Respondent) v. Duke's Hotel (1977) Inc. (Intervener). (*Granted*).

Unit: "all employees of Duke's Hotel (1977) Inc. at 154 Main St. W., Pt. Colborne Ont. save and except the owners." (7 employees in the unit).

Number of names of persons on list as originally prepared by employer		7
Number of persons who cast ballots	4	
Number of ballots marked in favour of Respondent	0	
Number of ballots marked against Respondent	4	

2081-78-R: Emery Baechler (Applicant) v. United Brotherhood of Carpenters and Joiners of America, Local 3054 (Respondent) v. Selinger Wood Ltd. (Intervener). (25 employees). (*Dismissed*).

APPLICATIONS FOR DECLARATION THAT STRIKE UNLAWFUL

0196-79-U: International Harvester Company of Canada Limited (Applicant) v. Mr. William D. Tetreault and Others (Respondent). (*Withdrawn*).

0235-79-U: Canada Envelope Company (Applicant) v. Canadian Paperworkers Union and its Local 1144, Leonard Hayes, Eloise Payne, M. Kennedy, and Those Persons Listed on Schedule "A" (Respondents). (*Granted*).

0353-79-U: The Corporation of the Town of Leamington (Applicant) v. Robert Aho, George Church et al (Respondents). (*Withdrawn*).

0354-79-U: The Corporation of the Town of Leamington (Applicant) v. Richard Morris, John Robertson et al (Respondents). (*Withdrawn*).

0357-79-U: The Corporation of the Town of Leamington (Applicant) v. Robert Aho, George Church, et al (See Schedule "A" attached) (Respondents). (*Withdrawn*).

0361-79-U: The Corporation of the Town of Leamington (Applicant) v. Richard Morris, John Robertson et al (See Schedule "A" attached) (Respondents). (*Withdrawn*).

APPLICATION FOR DECLARATION THAT LOCK-OUT UNLAWFUL

0090-79-U: Toronto Civic Employees Union, Local 43, Canadian Union of Public Employees (Applicant) v. The Corporation of the City of Toronto (Respondent). (*Withdrawn*).

0091-79-U: Toronto Civic Employees Union, Local 43, Canadian Union of Public Employees (Applicant) v. The Corporation of the City of Toronto (Respondent). (*Withdrawn*).

0205-79-U: Canadian Paperworkers Union and Holland Landing Local 1150 of The Canadian Paperworkers Union (Applicant) v. Cameron Packaging Inc. and Hugh T. Cameron (Respondents). (*Granted*).

APPLICATIONS FOR CONSENT TO PROSECUTE

0247-78-U: International Union of Bricklayers and Allied Craftsmen, Local 4, Ontario (Applicant) v. Dr. Hillers Peppermint Canada Limited and Karl Meyer (Respondents). (*Dismissed*).

0972-78-U: Labourers' International Union of North America, Local 506 (Applicant) v. Ontario Motor League – Toronto Club, and Neil Hissa (Respondents). (*Withdrawn*).

0077-79-U: Local Union 1590 of the International Brotherhood of Electrical Workers (Applicant) v. Bayly Engineering Limited (Respondent). (*Withdrawn*).

0358-79-U: The Corporation of the Town of Leamington (Applicant) v. Robert Aho, George Church, et al (See Schedule "A" attached). (Respondents). (*Withdrawn*).

0360-79-U: The Corporation of the Town of Leamington (Applicant) v. Richard Morris, John Robertson, et al (Respondents). (*Withdrawn*).

COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

1302-77-U: Rachelle Richards (Complainant) v. Vision '74 Nursing Home (Respondent) v. Christian Labour Association of Canada (Intervener).

- and -

1308-77-U: Rachelle Richards (Complainant) v. Christian Labour Association of Canada (Respondent) v. Vision '74 Nursing Home (Intervener).

- and -

1987-77-U: Rachelle Richards (Complainant) v. Christian Labour Association of Canada (Respondent) v. Vision '74 Nursing home (Intervener). (*Dismissed*).

0248-78-U: International Union of Bricklayers and Allied Craftsmen, Local 4, Ontario (Complainant) v. Dr. Hillers Peppermint Canada Limited and Karl Meyer (Respondents). (*Granted*).

- and -

1484-78-U: International Union of Bricklayers and Allied Craftsmen, Local 4, Ontario (Complainant) v. Dr. Hillers Peppermint Canada Limited and Karl Meyer (Respondents). (*Dismissed*).

0481-78-U: Amalgamated Meat Cutters & Butcher Workmen of North America AFL – CIO – CLC (Complainant) v. Cuddy Food Products Ltd. (Respondent). (*Granted*).

0971-78-U: Labourers' International Union of North America, Local 506 (Complainant) v. Ontario Motor League – Toronto Club, and Neil Hissa (Respondents). (*Withdrawn*).

1409-78-U: United Brotherhood of Carpenters and Joiners of America, Local 38 (Complainant) v. Foxhead Inn Ltd. (Respondent). (*Granted*).

1494-78-U: Teamsters Local Union No. 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Western Dispatch Inc. (Respondent). (*Withdrawn*).

1532-78-U: Michael I. Fletcher (Complainant) v. International Union of Elevator Constructors, Local No. 50, and the Joint Employment Committee Area 50 (Respondent). (*Withdrawn*).

1622-78-U: United Steelworkers of America (Complainant) v. McEwan Tougard Industries Ltd. (Respondent). (*Withdrawn*).

1647-78-U: United Steelworkers of America (Complainant) v. McEwan Tougard Industries Ltd. (Respondent). (*Withdrawn*).

1826-78-U: Service Employees International Union, Local 204 (Complainant) v. St. Raphael's Nursing Homes Limited (Respondent). (*Dismissed*).

1871-78-U: Office and Professional Employees International Union, Local 343 (Complainant) v. Laborers' International Union of North America, Local 1089 (Respondent). (*Dismissed*).

1880-78-U: Graphic Arts International Union, Local 35-P (Complainant) v. Toronto Star Newspapers Limited, Printing and Graphic Communications Union No. N-1 (Respondents). (*Dismissed*).

1921-78-U: The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Complainant) v. The Mechanical Trade Bargaining Committee of the Mechanical Contractors Association of Ontario (Respondent). (*Withdrawn*).

1972-78-U: Amalgamated Meat Cutters and Butcher Workmen of North America, AFL – CIO – CLC (Complainant) v. Sunny Orange Canada (1966) Ltd. (Respondent). (*Granted*).

2023-78-U: Canadian Union of Operating Engineers & General Workers (Complainant) v. A E S Data Limited (Respondent). (*Dismissed*).

2099-78-U: Amalgamated Meat Cutters and Butcher Workmen of North America, AFL – CIO – CLC (Complainant) v. Maple Lodge Farms Limited (Respondent). (*Dismissed*).

2170-78-U: Pharmacists and Professional Employees Association, Local 1976 Chartered by the Retail Clerks International Union, C.L.C. – A.F.L. (Complainant) v. North Park Nursing Home Ltd. (Respondent). (*Withdrawn*).

2183-78-U: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Peacock Lumber Ltd. (Respondent). (*Withdrawn*).

0005-79-U: Doug Garratt (Complainant) v. Molson's Brewery (Ontario) Limited (Respondent). (*Dismissed*).

0010-79-U: United Garment Workers of America and its Local 253 (Complainant) v. Hudson Sportswear Limited (Respondent). (*Withdrawn*).

0011-79-U: United Garment Workers of America and its Local 253 (Complainant) v. Cumberland Clothing Limited (Respondent). (*Withdrawn*).

0012-79-U: United Garment Workers of America and its Local 253 (Complainant) v. Reliable Sportswear Limited (Respondent). (*Withdrawn*).

0013-79-U: United Garment Workers of America and its Local 253 (Complainant) v. B & F Sportswear Limited (Respondent). (*Withdrawn*).

0014-79-U: United Garment Workers of America and its Local 253 (Complainant) v. United Sportswear Limited (Respondent). (*Withdrawn*).

0015-79-U: United Garment Workers of America and its Local 253 (Complainant) v. Style-Kraft Sportswear Limited (Respondent). (*Withdrawn*).

0016-79-U: United Garment Workers of America and its Local 253 (Complainant) v. Outdoor Outfits Limited (Respondent). (*Withdrawn*).

0017-79-U: United Garment Workers of America and its Local 253 (Complainant) v. Elite Sportswear Limited (Respondent). (*Withdrawn*).

0056-79-U: Teamsters Union Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Western Dispatch Inc. Operating as Western Dispatch Company (Respondent). (*Withdrawn*).

0070-79-U: Pharmacists and Professional Employees Association, Local 1976, Chartered by the Retail Clerks International Union, C.L.C.-A.F.L. (Complainant) v. North Park Nursing Home Ltd. (Respondent). (*Withdrawn*).

0071-79-U: Pharmacists and Professional Employees Association, Local 1976, Chartered by the Retail Clerks International Union C.L.C.-A.F.L. (Complainant) v. North Park Nursing Home Ltd. (Respondent). (*Withdrawn*).

0072-79-U: Pharmacists and Professional Employees Association, Local 1976, Chartered by the Retail Clerks International Union, C.L.C.-A.F.L. (Complainant) v. North Park Nursing Home Ltd. (Respondent). (*Withdrawn*).

0078-79-U: Local Union 1590 of the International Brotherhood of Electrical Workers (Complainant) v. Bayly Engineering Limited (Respondent). (*Withdrawn*).

0101-79-U: Bernard Cudahy (Complainant) v. The Etobicoke Professional Fire Fighters' Association Local No. 1137, International Association of Fire Fighters (Respondent). (*Withdrawn*).

0106-79-U: Canadian Union of Operating Engineers and General Workers (Complainant) v. The Cadillac Fairview Corporation Limited (Respondent). (*Dismissed*).

0109-79-U: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 141, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Laidlaw Transportation Limited (Respondent). (*Withdrawn*).

0128-79-U: Antonio Fernandes (Complainant) v. Labourers' International Union of North America Local 183, Toronto (Respondent). (*Withdrawn*).

0129-79-U: Retail Clerks Union, Local 486, chartered by the Retail Clerks International Union (Complainant) v. The Salvage Store Ltd. (Respondent). (*Withdrawn*).

0132-79-U: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Harding Carpets Limited (Respondent). (*Withdrawn*).

0158-79-U: United Brotherhood of Carpenters and Joiners of America, A.F.L., C.I.O., C.L.C. (Complainant) v. C.B. Wrought Iron Manufacturing Co. Ltd. (Respondent). (*Withdrawn*).

0168-79-U: Pharmacists and Professional Employees Association, Local 1976 Chartered by the Retail Clerks International Union (Complainant) v. Bradley Nursing Homes Ltd. (Respondent). (*Withdrawn*).

0176-79-U: Toronto Typographical Union No. 91 (ITU) (Complainant) v. Swift-O-Type Limited (Respondent). (*Withdrawn*).

0215-79-U: Retail Clerks Union, Local 486 (Complainant) v. Walkley I.G.A. (M. Loeb Ltd.) (Respondent). (*Withdrawn*).

0221-79-U: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.) (Complainant) v. Superior Metal Finishing Limited (Respondent). (*Withdrawn*).

0229-79-U: Hotels, Clubs, Restaurants, Tavern, Employees' Union Local 261 (Complainant) v. Marion Eveline, Carmen Fisher and The Management of Fuller's Restaurant, 809 Richmond Road, Ottawa, Ontario (Respondents). (*Withdrawn*).

0239-79-U: International Ladies' Garment Workers Union (Complainant) v. Sweet Petite Limited (Respondent). (*Withdrawn*).

0258-79-U: Terry Sowa (Complainant) v. Imperial Optical Company Ltd. (Respondent). (*Withdrawn*).

0262-79-U: Pharmacists and Professional Employees Association, Local 1976 Chartered by the Retail Clerks International Union (Complainant) v. Bradley Nursing Homes Ltd. (Respondent). (*Withdrawn*).

0263-79-U: Pharmacists and Professional Employees Association, Local 1976 Chartered by the Retail Clerks International Union (Complainant) v. Bradley Nursing Homes Ltd. (Respondent). (*Withdrawn*).

0265-79-U: International Union of Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.) (Complainant) v. Superior Metal Finishing Limited (Respondent). (*Withdrawn*).

0271-79-U: Laundry and Linen Drivers and Industrial Workers Union Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Astro Tire and Rubber Co. of Canada Ltd. (Respondent). (*Withdrawn*).

0286-79-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Complainant) v. Pennyworth's Department Stores Limited (Respondent). (*Withdrawn*).

0299-79-U: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.) (Complainant) v. Superior Metal Finishing Limited (Respondent). (*Withdrawn*).

APPLICATION UNDER SECTION 39

1978-78-M: John W. Spellman (Applicant) v. The University of Windsor Faculty Association (Respondent Trade Union) v. University of Windsor (Respondent Employer). (*Dismissed*).

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

0066-79-M: International Union, United Automobile, Aerospace and Agricultural Workers of America (U.A.W.), Local 251 (Applicant) v. Libby, McNeil and Libby of Canada, Limited (Respondent). (*Granted*).

0067-79-M: International Union, United Automobile, Aerospace and Agricultural Workers of Amer-

ica (U.A.W.), Local 35 (Applicant) v. Libby, McNeil and Libby of Canada, Limited (Respondents). (*Granted*).

APPLICATIONS UNDER SECTION 55

2159-78-R: Hotel, Motel and Restaurant Employees and Beverage Dispensers' Union Local 757 Thunder Bay, Ontario, of the Hotel and Restaurant Employees' and Bartenders' International Union, A.F.L. – C.I.O. (Applicant) v. Uptown Motor Hotel (1978) Limited (Respondent). (*Dismissed*).

0100-79-R: The Sheet Metal Workers' International Association, Local Union 285 (Applicant) v. McKay Heating Company and Innisfil Air Conditioning Limited (Respondents). (*Withdrawn*).

0156-79-R: The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. Gay Construction Limited and Ashly 333 Company Limited (Respondents). (*Withdrawn*).

APPLICATION FOR THE COLLEGES COLLECTIVE BARGAINING ACT 1975, UNDER SECTION 82

0888-75-M: Ontario Public Service Employees' Union (Applicant) v. The Board of Governors of Algonquin College, et al (Respondents) v. Group of Employees (Intervenors). (*Dismissed*).

APPLICATIONS FOR DETERMINATION UNDER SECTION 95(2)

0162-78-M: Office & Professional Employees International Union, Local 267 (Applicant) v. Nipigon – Red Rock Board of Education (Respondent). (*Withdrawn*).

0633-78-M: Canadian Union of Public Employees, Local 210 (Applicant) v. The Corporation of the City of Timmins (Respondent). (*Dismissed*).

1530-78-M: Service Employees International Union, Local 183 (Trade Union) v. Extendicare Ltd. (Employer). (*Granted*).

2132-78-M: Students' Union of Ryerson Polytechnical Institute (Employer) v. Canadian Union of Public Employees and its Local 1281 (Trade Union). (*Withdrawn*).

2139-78-M: The Peterborough Civic Hospital (Employer) v. Ontario Public Service Employees Union (Trade Union). (*Dismissed*).

2160-78-M: Canadian Union of Public Employees and its Local 932 (Trade Union) v. The Corporation of the Hamilton Public Library (Employer). (*Withdrawn*).

0157-79-M: Office & Professional Employees International Union, Local 151 (Trade Union) v. Abitibi Paper Company Ltd., Iroquois Falls Division (Employer). (*Withdrawn*).

REFERENCES TO BOARD PURSUANT TO SECTION 96

1657-78-M: Palmerston Town Manor Home for the Aged, Palmerston, Ontario (Employer) v. Canadian Union of Public Employees and its Local No. 2037 (Trade Union). (*Dismissed*).

0050-79-M: Ottawa – Carleton Regional Health Unit (Employer) v. The Civic Institute of Professional Personnel of Ottawa – Carleton (Trade Union). (*Dismissed*).

APPLICATIONS UNDER SECTION 112A

1904-78-M: United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. Knudsen's Painters and Decorators Limited (Respondent). (*Withdrawn*).

1920-78-M: Labourers' International Union of North America – Local 625 (Applicant) v. Elmara Construction Co. Ltd. (Respondent). (*Granted*).

1929-78-M: United Brotherhood of Carpenters & Joiners of America Local 494 (Applicant) v. Elmara Construction Co. Ltd. (Respondent). (*Granted*).

1964-78-M: Bricklayers, Masons, Tile Setters & Terrazzo Makers International Union Local No. 6 (Applicant) v. Elmara Construction Company Ltd. (Respondents). (*Granted*).

2121-78-M: The Toronto Building and Construction Trades Council, Carpenters' District Council of Toronto and Vicinity, International Union of Operating Engineers, Local 793 and Sheet Metal Workers International Association, Local Union No. 30 (Applicants) v. Napev Construction Limited (Respondent). (*Granted*).

0030-79-M: Ontario Council of the International Brotherhood of Painters and Allied Trades and the International Brotherhood of Painters and Allied Trades (Applicants) v. Painters' Council of Employers' Associations, Norbert Almeida Painting & Decorating and Normandy Painting & Decorating (Respondents). (*Granted*).

0069-79-M: International Association of Bridge, Structural and Ornamental Ironworkers Local Union 721 (Applicant) v. Yukon Crane Co. (Respondent). (*Granted*).

0145-79-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1304, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Architectural Woodwork Company Respondent). (*Granted*).

0189-79-M: International Association of Bridge Structural and Ornamental Ironworkers Local 700 (Applicant) v. T.R.E.L. of Sarnia Ltd. and Ontario Erectors Association (Respondent). (*Withdrawn*).

0191-79-M: United Brotherhood of Carpenters and Joiners of America – Local Union 93 (Applicant) v. Normand & Fleming Ltd. (Respondent). (*Granted*).

0195-79-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. Cowell Automation & Controls Limited and The Mechanical Contractors Association Toronto (Respondents). (*Granted*).

0197-79-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1304, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Vanbots Construction Limited (Respondent). (*Granted*).

0200-79-M: Labourers' International Union of North America, Local 183 (Applicant) v. Metropolitan Toronto Apartment Builders Association and Kerbel Developments Limited (Respondents). (*Granted*).

0338-79-M: International Association of Bridge, Structural and Ornamental Ironworkers, Local 700 (Applicant) v. Rodmen Employer Bargaining Agency, and G & H Steel Industries Limited (Respondent). (*Withdrawn*).

APPLICATION FOR RECONSIDERATION OF BOARD'S DECISION

1031-78-R: Service Employees International Union, affiliated with the A.F. of L., C.I.O., C.L.C. (Applicant) v. Elm Tree Nursing Home (Respondent). (*Certified*). (*Request Denied*).

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